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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 723.

KURT G. W. LUDECKE,

Petitioner,

vs.

W. FRANK WATKINS, Etc.,

Respondent.

BRIEF OF GEORGE C. DIX AND DAVID S. KUMBLE, ATTORNEYS FOR TWENTY-TWO ENEMY ALIENS NOW DETAINED ON ELLIS ISLAND, UNDER REMOVAL ORDERS IDENTICAL WITH THAT OF PETITIONER, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONER'S BRIEF.

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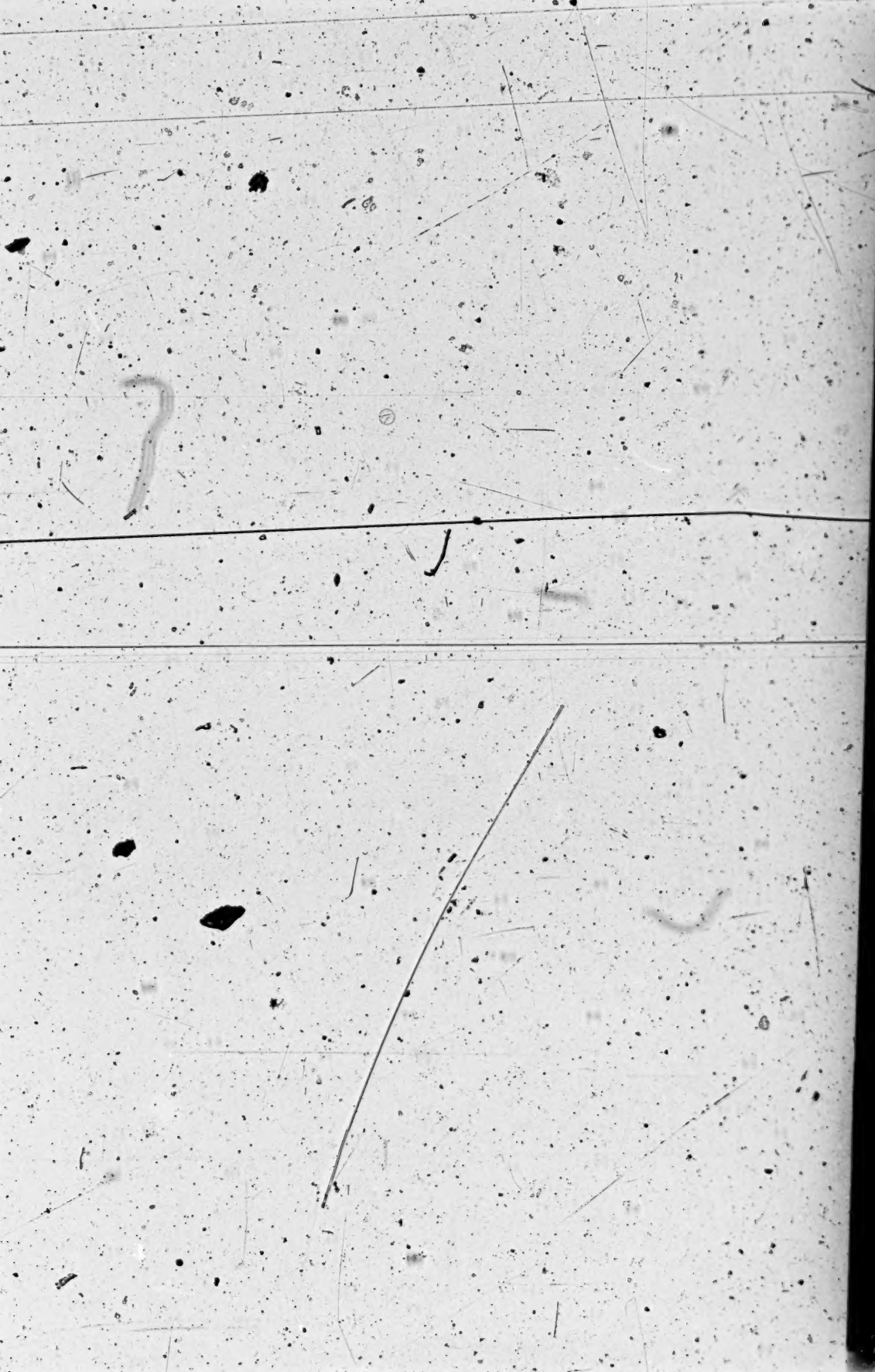

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Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 163 Fed. 2d 143. Other opinions involving the issues raised in this case are reported in 163 Fed. 2d 140, in 158 Fed. 2d 853, and in 67 Fed. Supp. 456.

Jurisdiction.

The jurisdiction of this Court rests upon Section 240 (a) of the judicial code as amended by Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. 347).

Questions Presented.

1. Do Sections 4067-4070 of the Revised Statutes (21 to 24 of Title 50 U. S. C.) correctly set forth the Alien Enemy Act as originally adopted by Congress.

2. Does the declaration of war by or against his country of origin automatically suspend or annul a legally resident alien's right to due process of law.

3. Was the petitioner an enemy alien at the time of the issuance of the removal order in view of the unconditional surrender of Germany, and the assumption of supreme and complete authority by the Allied Control Council.

4. Do removal orders issued without trial or fair hearing constitute a violation of the constitutional prohibition against bills of attainder.

5. Are these removal orders in violation of the terms of International Treaties to which the United States is a party.

Prefatory Statement.

The undersigned represent 22 persons alien enemies now detained on Ellis Island under removal orders identical with that in the case of petitioner Ludecke. All are legal residents of the United States. Six of them were naturalized citizens of the United States who were denaturalized during the war, four by default judgments, one by a consent judgment, and one after trial whose assigned counsel failed to appeal. Some of our clients are the fathers of native-born citizens, and are husbands of native-born and naturalized citizen wives. All our clients arrived in the United States as quota immigrants and have been continuously resident and domiciled here since, some as long as 25 years. A writ on behalf of our clients is pending undetermined before the United States District Court for the Southern District of New York, the hearing thereon having been completed on February 19, 1948.

Treaties and Statutes Involved.

The Alien Enemy Act of July 6, 1798. Treaty of Friendship with Germany dated October 14, 1925. Extradition Treaty with Germany signed July 12, 1930. Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro, September 2, 1947. Geneva Convention of 1929, and Hague Conventions.

Summary of Argument.

The central issues in this appeal are matters of substantive justice and law—not of mere technicalities of law—or, quite simply, of due process as to the removal from the United States of the relators as ordered by the Attorney General and upheld by the lower courts. The Attorney General's removal order has, as its main authority, the Presidential proclamation of July 14, 1945. This proclamation authorized the Attorney General to order the removal of such interned alien enemies as he may deem to be "dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof."

The fatal weakness of this Presidential proclamation and of the pursuant action by the Attorney General in these cases is the failure to provide for a hearing and for procedure calculated to insure a fair and reasonably accurate determination of the facts in each case. This weakness is not technical. It is fundamental. It is not so much a matter of protecting the rights of certain alien relators as it is of safeguarding for the future the public interest of the American people in being secure against arbitrary, capricious and abusive uses of power by the Executive branch in respect to such a crucial function as that of declaring what are the facts on which an exercise of the Executive power is based.

If any function of the courts is well established and definite, it is that of insuring protection to all under their jurisdiction against exercises of power by government agencies which are unwarranted by law and the facts. In declaring what is the law and what are the facts every government agency or official is limited in ways which it would seem superfluous to expound to this Court. Any finding of fact or declaration of facts to be made the basis of an exercise of the power of the state must measure up to certain standards. No government official has the right to proceed on the theory that the facts are whatever he may choose to say they are and that any finding of fact he may announce can be arrived at in any way he may see fit and cannot be challenged. It is of the essence of due process or the rule of law that findings of fact shall be arrived at in accordance with certain rules. An official cannot flip a coin to decide whether he will hold an alien enemy to be dangerous to the public peace and safety of the United States. Nor can he take the position that how he arrives at this conclusion in a given case is nobody's business but his own.

In time of war it is only natural and inevitable that any state should exercise the power to protect itself against alien enemies, actual and potential. During a war emergency it is natural that government agencies or officials charged with the protection of the state against foreign foes should not be required to prove affirmatively a case against an alien of enemy origin in order to be able to intern him in what the English call preventive custody. In such a period the state may be indulged the right to presume that any one of enemy origin is a potential enemy who should be interned or held in preventive custody. As will be pointed out, farther on, the British, in the late war, showed by their handling of this problem that it is in the public interest of a nation at war to afford generous facilities for enemy aliens under its control to show that they are not likely to prove dangerous and that they ought to be accorded a status and treatment in keeping with

their general attitude at the time, rather than with their technical status and the presumptions which would normally flow from it.

In wartime the only proof the state needs to intern an alien enemy is a birth certificate, or passport attesting the enemy origin and citizenship of the person in question. If the alien is not prepared to submit evidence to rebut such proofs of enemy nationality, it may be conceded that the interning state has made out a sufficient case for internment.

But, even for the duration of the state of war, it is most interesting for the purposes of this appeal to note that during the recent war the British government found it expedient, as a matter of national interest, to proceed somewhat judicially to determine just what alien enemies should and should not be interned. According to a well documented article by Dr. Robert M. W. Kempner in the American Journal of International Law of July 1940, the British set up no less than 112 tribunals, each presided over by a King's counselor, to hear the case of each one of no fewer than 74,233 alien enemies domiciled or temporarily in England at the outbreak of the war.

As these hearings went on in England during the latter part of 1939 and the first half of 1940, while the island was suffering almost daily bombings by enemy planes and while it was actually carrying out an evacuation of troops from the Continent, it is to be assumed that the British did not go to all this trouble out of maudlin sentiment for the enemy and for persons of enemy origin and nationality. It is to be assumed that they did it only for reasons grounded in the cold logic of national self-interest.

The point of citing this British wartime precedent of giving hearings to determine whether the facts of each case justified internment, conditional liberty or unrestricted freedom for alien enemies in time of war is merely to rebut the reasoning that there is anything in this appeal brief calculated to limit the power of the

state to protect itself against dangerous aliens. To ask that the state act on a finding of this nature only after it has observed certain universally recognized procedural formalities for fact-finding, is both to argue for due process and the most obvious requisites of sound public policy. The Court is being asked in this case to safeguard the public interest quite as much as any rights these aliens may have in the premises.

The public interest in this matter is far more important than any rights these aliens may have. The public interest requires that fact-finding by the Executive in any action involving the rights or interests of persons under the court's jurisdiction be made only in accordance with certain minimum formalities, one of which is a hearing at which the person adversely affected by the administrative finding of fact and challenging its accuracy is given opportunity to rebut any evidence on which the finding is based and to present evidence controverting it.

These aliens have never had a fair opportunity to oppose their threatened removal. They do not know the evidentiary bases of the removal orders, if any. The charges against them were never disclosed. They were never confronted by any witness. They were denied the right to counsel.

A person challenging an order of internment in wartime on the ground he was an alien enemy, if he denied the nationality imputed to him, would naturally submit with his challenge some evidence supporting his claim to a different nationality. But a person challenging the statement that he is removable because he is dangerous to the public peace and safety of the United States because of his national origin cannot be expected to tender evidence in support of his challenge as long as the challenged statement has never been supported by any evidence made public or available to him. The burden of proof is on the affirmative. Some negatives are not susceptible of proof. The theory of the government, upheld by the decisions of the lower Courts, is that the Attorney

General can, at his discretion, make the affirmative declaration that it is a fact that any aliens of enemy nationality in this country he may choose to name are dangerous to the public safety of this nation and that he does not have to offer or be in possession of any proof or any evidence in support of that affirmative.

The aliens challenge this theory. They base their challenge both on points of law hereinafter developed and on the far bigger and broader concept of the public interest which they respectfully urge upon the Court. If these removal orders are sustained by this Court of last resort, a sinister precedent would be established. If an Attorney General can make his finding of fact an incontestable basis for a removal action against an alien, without having made such a finding in accordance with well established rules, one of which is the formality of a hearing, why cannot a future Attorney General make a finding of fact about a native born citizen, similarly arrived at, the basis of some punitive or restrictive action against such a citizen which the Attorney General may be authorized to take, as, for example, in connection with the loyalty tests?

The essence of the difference between our political system and that of Soviet Russia is that civil rights cannot be impaired here by findings of fact and rulings of law except in accordance with certain procedure. In Russia an appropriate agency or official of the state can declare any alien dangerous, as the Attorney General has done in these cases, or any citizen subversive, disloyal or something else bad and can make that finding of fact, not arrived at by due process, the basis of almost any kind of punitive, repressive or other adverse action by the state. In Russia, the state does not have to prove a charge against or a characterization of an individual. The state has only to make it. These cases are an entering wedge for this sort of practise by our State. If the state can make a label stick merely by having the Attorney General apply it to an individual,

a new precedent in American jurisprudence and civil rights enforcement will have been established. The fact that, in the present instance, the victim of the Executive labelling without a hearing or privilege of rebuttal happens to be a person of foreign birth and of the nationality of our late enemies, the Germans, is relatively unimportant. Every one living under the jurisdiction of our courts and laws is supposed to enjoy their fullest protection. In this respect, the native born citizen is no better off in point of law than the alien. If the Attorney General can make a fact finding label, arrived at without a hearing and opportunity for rebuttal, stick as against an alien enemy under the jurisdiction of our courts, he can make a similar label, similarly arrived at, stick as against any native born citizen, given a requisite combination of circumstances.

ARGUMENT.

I.

Sections 4067-4070 of the Revised Statutes under which the respondent is proceeding are not the law. The words "resident within the United States", and other words vitally material to Relators' cases have been improperly omitted.

Respondent seeks to justify petitioner's detention by Sections 4067-4070 of the Revised Statutes (50 U. S. C., Sections 21-24). Comparison of these sections with the Alien Enemy Act (1 Stat. 577) as originally adopted by Congress on July 6, 1798 shows that certain words have been omitted which are vitally material to Relators' rights. Research shows that these omissions were not authorized by Congress, and that they are contrary to the intent of Congress as expressed at the time the Revised Statutes were adopted.

The omitted words are: "Provided * * * resident within the United States" (omitted from Section 22), and "alien or * * * as aforesaid, who shall be" (omitted from Section 23).

The Alien Enemy Act as originally adopted by Congress on July 6, 1798 reads:

"CHAP. LXVI.—AN ACT RESPECTING ALIEN ENEMIES

"SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever there shall be a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion shall be perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government, and the President of the United States shall make public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies. And the President of the United States shall be, and he is hereby authorized, in any event, as aforesaid, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, towards the aliens who shall become liable, as aforesaid; the manner and degree of the restraint to which they shall be subject, and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those, who, not being permitted to reside within the United States, shall refuse or neglect to depart therefrom; and to establish any other regulations which shall be found necessary in the premises

and for the public safety: *Provided, that* aliens *resident within the United States,* who shall become liable as enemies, in the manner aforesaid, and who shall not be chargeable with actual hostility, or other crime against the public safety, shall be allowed, for the recovery, disposal, and removal of their goods and effects, and for their departure, the full time which is, or shall be stipulated by any treaty, where any shall have been between the United States, and the hostile nation or government, of which they shall be natives, citizens, denizens or subjects: and where no such treaty shall have existed, the President of the United States may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality.

"SECTION 2. And be it further enacted, That after any proclamation shall be made as aforesaid, it shall be the duty of the several courts of the United States, *and of each state,* having criminal jurisdiction, and of the several judges and justices of the courts of the United States, and they shall be, and are hereby respectively, authorized upon complaint, against any *alien or* alien enemies, *as aforesaid, who shall be* resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President of the United States shall and may establish in the premises, to cause such alien or aliens to be duly apprehended and convened before such court, judge or justice; and after a full examination and hearing on such complaint, and sufficient cause therefor appearing, shall and may order such alien or aliens to be removed out of the territory of the United States, or to give sureties of their good behaviour, or to be otherwise restrained, conformably to the proclamation or regula-

tions which shall and may be established as aforesaid, and may imprison, or otherwise secure such alien or aliens, until the order which shall and may be made, as aforesaid, shall be performed.

"SECTION 3. And be it further enacted, That it shall be the duty of the marshal of the District in which any alien enemy shall be apprehended, who by the President of the United States, or by order of any court, judge or justice, *as aforesaid,* shall be required to depart, and to be removed, as aforesaid, to provide therefor, and to execute such order, by himself or his deputy, or other discreet person or persons to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such removal the marshal shall have the warrant of the President of the United States, or of the court, judge or justice ordering the same, as the case may be.

"Approved, July 6, 1798."

The italics indicate the words which have been omitted in the Revised Statutes. Some of the omissions were authorized, but the most important in so far as they relate to Relators' rights were not authorized. The words "being males" and "and of each state" were omitted by act of Congress. "Being males" was omitted by the Act of April 16, 1918 (40 Stat. 531), and "and of each state" by amendment at the time the Revised Statutes were under discussion in Congress early in the year 1874 (Congressional Record, Jan. 1874, p. 1417).

Reading the Alien Enemy Act as a whole it is clear that the proviso in Section 1 was intended to and did take the special cases or class of cases of all resident aliens and resident alien enemies out of the operation of the body of the section in which it is found. It has repeatedly been held that a proviso is intended to except

something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation.

McDonald v. *U. S.*, 279 U. S. 12, 20;
U. S. v. *McIlrain*, 272 U. S. 633, 635.

Generally a thing that is excepted from the operation of a statute must necessarily belong to the class of things from which it is excepted.

Pott v. *Arthur*, 104 U. S. 735.

Can there be any doubt that when read as a whole, as any law must be, the Alien Enemy Act applied to all alien enemies, and that the proviso in Section 1 was put in for the purpose of setting apart for special consideration, and granting greater rights to those alien enemies who were "resident within the United States". Certainly Congress used those words and inserted them in a proviso in order to make sure that those aliens and alien enemies who might become subject to the Act would be treated in a manner different from non-residents. Again in Section 2 of the Act Congress in using the words "as aforesaid", certainly had reference to the previous section in which it had singled out alien enemies resident in the United States. This is all the more apparent on reading Section 2 making it the duty of courts having criminal jurisdiction to cause "any alien or alien enemies, as aforesaid, who shall be resident and at large * * * to be duly apprehended". Again we find a distinction made between alien enemies who are non-residents, and alien enemies who are residents.

In Section 3 the use of the words "as aforesaid" again shows that Congress had in mind the distinction made in Section 1 by the proviso at the end of that section. It clearly shows that Congress had in mind the rights of persons who had abandoned their original domiciles and established permanent residence in the United States,

thus entitling them to enjoy the benefits of all other residents.

It is to be noted that Congress definitely provided for due process of law in the case of alien enemies resident within the United States, because in Section 2 provision is made for "a full examination and hearing".

We are aware that Judge Rifkind in the *Schlueter* case (67 F. Supp. 526), held that an alien enemy is not entitled to due process, and has no rights other than those which the sovereign chooses to grant, that he may not complain about an unfair hearing, because he is not entitled to any hearing at all. We insist that the right to a full examination and hearing was granted to resident alien enemies in the Alien Enemy Act, and that having been so granted such rights the petitioner is entitled to object when they are denied to him.

The Revised Statutes Improperly Omitted Words Vitally Material to Relators' Rights.

By the Act of June 27, 1866 "To provide for the Revision and consolidation of the Statute laws of the United States" (14 Stat. 74) the President was authorized to appoint three persons, as commissioners "to revise, simplify, arrange and consolidate all statutes of the U. S., general and permanent in their nature, which shall be in force at the time such commissioners may make the final report of their doings" • • • "that the Statutes so revised and consolidated shall be reported to Congress as soon as practicable and the whole work closed without unnecessary delay" • • •.

Nothing seems to have been done under this Act, and on May 4, 1870, the President approved "an Act to provide for the Revision and consolidation of the Statutes of the United States" (16 Stat. 96) which act revised the Act of June 27, 1866. Commissioners were appointed, and from a quotation by Representative Lawrence, in

which he refers to "The Commissioner's Report on Draft of Revision, Vol. I, p. 643, Sec. 4" (Congressional Record, 43/1, p. 825) it will be seen that they submitted their report, and presumably, direct to Congress as authorized by the act; their report was undoubtedly referred to the Committee on Revision of the Laws, and was embodied in House bill 1215 reported by Mr. Poland from that Committee January 14, 1874, who stated that it was not accompanied by a written report of the committee (Congressional Record, 43/1, p. 647). This bill was debated in the House and Senate, amendments made, and finally passed and approved by the President on June 22, 1874.

The Commissioner's Report was printed in 2 volumes. The Alien Enemy Act appears on pages 1957 and 1958 of the Commissioner's Report as Sections 5, 6, 7 and 8 under the title FOREIGN RELATIONS. Section 5 repeats the first part of Section 1 of the original act to the word "Provided". Section 6 repeats that part of Section 1 of the original act which commences with the word "Provided", and does *not omit* the words "resident within the United States". Section 7 of the Commissioners Report repeats Section 2 of the original act, but omits the words "alien or * * * as aforesaid, who shall be". Section 8 repeats Section 3 of the original act, but omits the words "as aforesaid".

On March 3, 1873 Congress appointed a committee of three and authorized it to accept from the commissioners their report, and to discharge said commissioners. Their powers were repealed, but the acceptance by the committee of the report was not to be construed as approval or adoption by Congress of any part of their work. The committee was authorized to contract with a person learned in the law to prepare a bill to be presented on the following December at the opening of Congress with a proper index—so Congress can act on the bill (17 Stat. 579-80).

Pursuant to said authority the committee employed Mr. Durant, an attorney in Washington, D. C., to go over

the work. The committee decided that in their judgment it was not advisable to attempt any change whatever in the existing law. When they employed Mr. Durant they directed him in every case where he found that new legislation had been inserted by the commissioners to strike out such modifications of the existing law. He was directed wherever the meaning of the law had been changed, to strike out such change (Congressional Record, December 10, 1873, p. 646). The committee stated to the Congress that it wished to be able to assure the House that the work had been presented with such changes and amendments as they found necessary to make, "so that it will be an exact transcript, an exact reflex of the existing statute law of the United States, that there shall be nothing omitted and nothing changed" (p. 646). To a question by Congressman Maynard whether any modification of existing law was contemplated, Mr. Poland, in charge of the bill, replied: "Not at all, * * * the slightest * * * the design of the committee is not themselves to propose any amendment, that shall change the law, nor to allow anybody else to do so if they can prevent it" (p. 648). And again on page 1028 Mr. Poland said: "* * * My friend seems to have an idea we have a lurking purpose to change the law, when we have determined ourselves, and said so, here and everywhere, and to everybody, not only that we did not intend to do it ourselves, but did not intend to allow anybody else to do it if we could possibly help. * * * The committee do not intend to make or to allow, if they can help, the slightest change in the law."

"We are going through this in a liberal, goodnatured way, and with the understanding, agreed to all around by general consent, if anything is discovered which is wrong, we are to go back and correct it * * *."

The Congressional Record shows, page 1417, that when the Alien Enemy Act came before the Congress in con-

nection with the revision Mr. Hoar proposed an amendment to Section 2 of the Original Act, numbered Section 4132 of the Proposed Revision, by striking out the words "and of each state". He said:

> "This section is the original alien act of 1798, and at the time it was passed Congress apparently had not considered the power of the United States to confer jurisdiction on the State Courts. Since then the Supreme Court has held there is no such power * * * as this portion of the act of 1798 does not conform to the Constitution, it could not be considered as a valid part of the existing law, and that the words indicated should be stricken out."

The amendment was agreed to (Congressional Record, 1874, p. 1417).

This section was the only section of the Alien Enemy Act which was read and referred to by Congress during the debates on the revision.

On April 1, 1874 the work of revision was completed. On that date Mr. Poland moved an amendment as an additional title to the bill, he said:

> "Mr. Speaker we have offered these provisions so as to guard against every possible harm which can arise to anybody. It may be possible some provision of law has escaped everybody's search. The commissioners went over this work for three years, and Mr. Durant reviewed it all, and after the thorough search our committee have made into it, they do not believe any important provision of law has been omitted in this revision; but it is possible, with all our care something may have been omitted. We have therefore, in drawing these provisions, provided no man's right shall be affected by this repeal in any manner, or form, or any public right, so if it should turn out some provision of law has escaped our reading, and

been omitted in this revision, it will not affect any man's right, but will be only a loss of so much statute law. We think there is no danger in adopting these provisions, which have been most carefully and thoroughly considered."

The bill was adopted and subsequently sent to the Senate, where it was considered on May 27, 1874. Mr. Conkling in charge of the bill, addressing the Senate said:

"I have no expectation that this work is free from error. I have never known any revision of laws that was."

After short debate the bill was passed by the Senate on the same day, May 27, 1874, and on June 22, 1874 was signed by the President.

It has repeatedly been held that a mere change of phraseology, or punctuation, or the addition or omission of words in the revision does not necessarily change the operation or effect of the original law and will not do so unless the intent to make such change is clear and unmistakable.

U. S. v. *Cress*, 243 U. S. 316;
Baldwin v. *Franks*, 120 U. S. 678;
Donald v. *Hovey*, 110 U. S. 619.

Usually a revision of statutes simply iterates the former declaration of legislative will. No presumption arises from changes such as punctuation or phraseology, or the addition or omission of words, that the revisors, or the legislature in adopting the revision intended to change the existing law, but the presumption is to the contrary unless an intent to change it clearly appears.

Anderson v. *Pacific Coast S. S. Co.*, 225 U. S. 187;
U. S. v. *Ryder*, 110 U. S. 729;

Harlan Coal Co. v. *North America Co.*, 35 Fed. 2 296;
Federal Reserve Bank v. *Webster*, 287 F. 579.

Where provisions of a statute are carried forward and embodied in a section of a revision or codification, in the same words, or in words which are substantially the same and not different in meaning, the latter provision will be considered a continuance of the old law and not as a new and original enactment.

U. S. v. *Bathgate*, 246 U. S. 220;
Walsh Construction Co. v. *City of Cleveland*, 271 Fed. 701.

A change of the law by revision will not be presumed, unless the language in the revision cannot possibly bear the same construction as the revised and repealed act.

Anderson v. *Pacific Coast S. S. Co.*, 225 U. S. 187;
Hermann v. *Edwards*, 238 U. S. 107;
Federal Reserve Bank v. *Webster*, 287 Fed. 579, 586.

The foregoing recital of the intention of the revisors as stated to the House and Senate at the time the Revised Statute bill was under consideration clearly shows that no change in the existing law was intended. We have shown that the existing law made special provision for alien enemies resident within the United States. That was the law as it existed on December 1, 1873. That was the intention of the law when the Revised Statutes were enacted. No change in such intent was authorized by Congress. The omissions are clearly not intended. Therefore the original law must apply to Relators' cases. The fact that Congress authorized by the revision the splitting of Section 1 of the original Alien Enemy Act into Sections 21 and 22 of the Revised Statutes does not change

the situation. In such a case it is the duty of the Court to construe the two sections together as in the original act, as was done in *Merchants National Bank of Baltimore v. U. S.*, 214 U. S. 33. Exactly the same situation was presented by that case.

From the foregoing we submit it is clear that Congress intended and enacted that alien enemies resident within the United States should be excepted from the provisions applicable to all alien enemies in so far as their removal was concerned, and reserved to them special rights including the right of full examination and hearing.

When in 1919 the then Attorney General wished to avoid bringing removal cases to court he applied to Congress for authority to deport interned alien enemies without a hearing, merely on the ground that they had been interned. Congress, however, differed, and while granting the Executive the right to deport alien enemies made this right conditional upon giving them a hearing as in all deportation cases, as will be shown in the following point of this brief.

II.

Petitioner is entitled to a hearing. A removal order issued without giving him a fair hearing is invalid.

Petitioner maintains that he is entitled to a fair hearing before the President can order his removal, and that a removal order issued without giving him a fair hearing is invalid. This is not petitioner's unsupported opinion. It is the expressed intent of Congress. The problem is not new. The same situation arose after the armistice of World War I, and before ratification of the Peace Treaty. On February 5, 1919 the United States Attorney General Gregory wrote to Honorable John L. Burnett, Chairman

of the House Committee on Immigration and Naturalization as follows:

"Sir:

At our request you have introduced House Bill No. 14948, the object of which is to provide for excluding and deporting in proper cases persons who, during the war, have either been convicted of war offenses or interned by Presidential warrant as dangerous alien enemies.

* * * * *

There is no law now on the statute books under which these persons can be excluded from the country, nor under which they can be detained in custody after the ratification of the peace treaty. Unless the bill introduced by you, or one similar in character is passed, it will become necessary on the ratification of peace to set free all of these highly dangerous persons.

In view of the gravity of this situation, we therefore take the unusual course of requesting jointly that you take the necessary steps to secure the immediate consideration and, if possible, passage of this measure by the House of Representatives.

Respectfully,

Attorney General,
The Secretary of Labor."

The text of this letter is to be found in the "Hearings before The Committee on Immigration and Naturalization, House of Representatives, 66th Congress, First Session, H. R. 6750, July 16-17, 1919, pp. 42-43.

Mr. Burnett thereupon introduced a bill which died on the House calendar. At the next session Attorney General Palmer on May 27 and August 13, 1919 wrote to the Chairman of the Committees on Immigration, of the

House and Senate, respectively. His letters repeated substantially the statements of Mr. Gregory, and in particular that:

> "* * * there is no law now on the statute books under which these persons can be excluded from the country, nor under which they can be detained in custody after the ratification of the treaty of peace. * * *."

The proposed bill as submitted by the Attorney General provided that the fact of internment was *prima facie* evidence of undesirability. This provision was stricken out by the Committee which had the bill under consideration. The bill as finally enacted provided for *a hearing as in all other deportation proceedings.* Mr. Thompson, a member of the Committee, told the Congress that the Committee was responsible for the language in the bill and that the responsibility was not with the Attorney General's office.

During consideration of the bill Mr. Welty, a member of the Committee, read into the hearing record (p. 20) from the opinion of Mr. Justice Harlan, in *The Japanese Immigration* case, 189 U. S. 86, 100, as follows:

> "But this court has never held nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons may disregard the fundamental principles that inhere in 'due process of law', as understood at the time of the adoption of the Constitution. * * *."

Mr. Welty also read from the opinion of Mr. Justice Day in *Low Wah Suey,* 225 U. S. 460, 469:

> "A series of decisions in this Court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclu-

sions and orders made upon such hearings it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute."

The Committee reported the bill with an amendment, *unanimously* recommended passage of the bill as amended (Report. No. 143), and stated that internees *"will be given full hearing, as in all cases of deportation under existing laws"*.

During debate on the bill Representative Baker, a member of the Committee, stated:

"* * * there might be in the heat of war some man who might have been interned without just cause. We believed that in justice to everyone, while the matter is now passed over, that the man before being deported should be given a full and fair opportunity to be heard, and if he can show an injustice to himself * * * he should have the opportunity to do so" (Congressional Record, July 30, 1919, 3363).

And Mr. Moore of Pennsylvania also during debate on the bill said:

"In its original form the bill admitted of the deportation of a man who had simply been sent to an internment camp, a proceeding which I regard as very dangerous and destructive of the rights of man, because if a man had been sent to a camp without anything to support his internment, except the suspicion of somebody who did not like him, it might place him wholly in the hands of another man, or of some autocratic power, which wants to get rid of him without justice and without humanity" (Congressional Record July 30, 1919, 3363).

The bill was passed by both the House and the Senate without a dissenting vote and became law on May 10, 1920 at 41 Stat. 593. It is significant that Congress, though it specifically referred to Section 4067 of the Revised Statutes in Section (1) of the new law, did not use the word *removal*, but used the word *deport* in the title and the word *deported* in the text of the law.

The Act of May 10, 1920 provides in part as follows:

> "* * * That aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall, * * * be deported in the manner provided in sections 19 and 20 of the Act of February 5, 1917, if the Secretary of Labor, *after hearing*, finds that such aliens are undesirable residents of the United States, to wit:
>
> (1) All aliens who are now interned under section 4067 of the Revised Statutes of the United States and the proclamations issued by the President in pursuance of said section under date of April 6, 1917, November 16, 1917, December 11, 1917, and April 19, 1918 respectively". (C. 174, 41 Stat. 593).

When the United States Attorney General expressed the opinion that there was "no law now on the statute books under which internees could be excluded from the country," he had before him the Alien Enemy Act, for §4067 of the Revised Statutes, mentioned in the Act of Congress, is that act, itself. In saying that these persons could not be "excluded" from the country, he certainly meant "expelled" as well as "denied readmission". Excluded commonly means expelled, and they certainly had to be expelled before they could be kept out.

Not only the Attorney General, but also his then assistants in charge of interned alien enemies, John Lord O'Brian, John T. Creighton and John Hanna (now Professor of Law at Columbia University), were of the opinion that before the enactment of the law of May 10, 1920

there was no law on the statute books under which alien enemies could be removed, at least as far as the Executive Power is concerned. Then as now action could have been brought in court upon complaint, but it was not done. Instead the power to do it by executive action alone was asked and obtained from Congress.

The writer of this brief interviewed Professor John Hanna concerning the history of the Act of May 10, 1920, and was informed that to his best recollection there exist in the files of the Justice Department memoranda and correspondence supporting the opinion expressed by Attorney General Gregory in his letter to the Chairman of the House Committee on Immigration. In view of this information the manner in which the entire episode of the Gregory opinion and the act of Congress of May 10, 1920 were handled in the *Citizens' Protective League* case, is of paramount interest. The text of the Gregory opinion was not submitted, and in the *Citizens' Protective League* case, the Government which was the only one to refer to the Gregory opinion, argued without presenting the opinion itself that the Attorney General *had affirmed* the President's power to remove. The text of that opinion, however, is directly to the contrary. It stated:

> "There is no law now on the statute books under which these persons can be excluded from the country, nor under which they can be detained in custody after the ratification of the peace treaty."

It is respectfully submitted that the statement in the *Citizens' Protective League* case that "a reading of these letters gives no information as to the reasons for the conclusion that new legislation was essential," is wholly inadequate when the clear language of the opinion can be read.

We submit that the re-enactment by Congress without change of a statute which had previously received long continued executive construction is an adoption by Congress of such construction.

U. S. v. *Hermanos*, 200 U. S. 337-339;
U. S. v. *Falk*, 204 U. S. 143, 152;
Mayes v. *Paul Jones Co.*, 270 Fed. 121, 122.

In the *Mayes* case the Court said:

> "Congress is presumed to have known the long-continued executive construction given to paragraph 3 of section 3244, R. S., when it enacted this Revenue Act of October 3, 1917. It is also presumed to have known the rule of construction announced by the Supreme Court in *U. S.* v. *Hermanos* and *U. S.* v. *Falk*, *supra*. *Buckley* v. *Stephens*, 29 Ohio St. 620-622. The conclusion follows that it intended to adopt this construction as fully and completely as if it had written it into the act itself."
>
> "* * * In the construction of a statute it is the duty of the court to give full force and effect to the intent and purpose of the law-making power responsible for its enactment. If this intent and purpose can be ascertained from the language of the statute itself, then that language must control."

At the time Congress adopted the Act of May 10, 1920 there had been a long continued executive construction given to the Alien Enemy Act by the Executive. Congress having adopted that construction the Executive was no longer at liberty to change that construction.

We concede that during actual hostilities hearings might in some cases have hampered our war efforts or given aid to the enemy. But now that Germany is vanquished and hostilities have been officially terminated that reason for refusing a hearing no longer exists. This apparently also was the judgment of Congress in 1920. On this point we respectfully quote Judge Mayer of this Court in the *Gilroy* case:

> "Vital as is the necessity in time of war not to hamper acts of the Executive in the defense of the

nation and in the prosecution of the war, of equal and perhaps greater importance is the preservation of constitutional rights."

If even war criminals are given a trial, told the charges, and permitted to be represented by counsel, why should these rights be denied to petitioners?

III.

The declaration of war by or against his country of origin does not suspend or annul a legally resident alien's right to due process of law.

A. War powers are subject to constitutional limitations.

The Alien Enemy Act is strictly a war measure. It is dormant in times of peace. It comes into effect only in time of war. The powers of Congress to authorize measures for the prosecution of war, comprehensive though they are, are by no means unlimited. There still remain in force, in war as well as in peace, the general constitutional limitations upon the exercise of federal powers.

In *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, this Court said:

> "The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations."

And in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, it declared:

> "The mere existence of a state of war could not suspend or change the operation upon the powers of

Congress of the guaranties and limitations of the Fifth and Sixth Amendments."

These constitutional guarantees include the right to due process, the rule of law.

B. Even though petitioner is an alien enemy he is entitled to due process of law.

In the first *Schlueter* case, 67 Fed. Supp. 556, it was held that an alien enemy had no right to a hearing and therefore may not complain about an unfair hearing. We sharply take issue with that position. True, in the barbaric days of Rome prisoners of war had no rights and could be used by the victor to stage gladiatorial contests, paraded in chains, enslaved, etc. But we are a Christian Nation, and we hope, far removed from such practices, which are repugnant to the principles of Christianity. Grotius, "On the Usage of War", shows that even in his days alien enemies had rights. The Geneva Convention of 1929, and the Hague Convention of 1908 on the treatment and rights of prisoners of war certainly have modified the old idea that prisoners of war have no rights. Some ill-informed persons have said that we are no longer bound by the Geneva Convention after the German surrender. This is not correct. By its terms the Convention may not be denounced by a signatory during a war in which the denouncing party is involved. For the United States the Geneva Convention continues in effect at least until the conclusion of peace. And, of course, the mainstay of the Government's argument in petitioner's case is that while hostilities have ceased, the state of war still exists, because as yet there is no peace.

The widely publicized purpose of the Nuernberg trial was to establish the supremacy of law and treaties, and to do away with the old-fashioned idea that war sanctions everything, that the victor may do with the van-

quished as he chooses, merely because he is the victor. The Nuernberg trials were held to punish war criminals for doing the very thing which the Government claims it has the right to do to petitioner, and all other alien enemies: To treat them as if they had no rights.

Further the Emergency Advisory Committee for Political Defense, of which the United States is an active and directive member, recommended that interned civilians be treated as prisoners of war under the Geneva Convention (Committee's Annual Report, July 1943, p. 78). On May 23, 1942 the State Department Bulletin, page 445 stated that the Government of the United States would, "in accord with its previous declaration to the German Government, apply to German nationals interned in the United States the provisions of the Geneva Convention". In view of this we submit that the decision in the first *Schlueter* case is in error, and that prisoners of war do have rights which must be respected. Due process of law is one of those rights.

This Court in *Chambers* v. *Florida*, 309 U. S. 227 said:

> "All people must stand on an equality before the bar of justice in every American court. Under our court system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement."

Except for the difference in the respective political beliefs involved, the cases of Harry Bridges and that of petitioner involve the same essential issue. Bridges was to be deported because he was said to be a member of an organization advocating the forceful overthrow of our Government. Petitioner is to be "removed" for "adhering" to a government which *we* have overthrown. In both cases violence is done to our fundamental American

principle that guilt is personal, and may not be imputed by association.

Like Bridges, petitioner is to be deported because guilt is imputed to him by association. The Attorney General has deemed that petitioner "adhered" to the enemy. The same ruling applies to all enemy aliens now detained on Ellis Island under removal orders. No distinction is made in individual cases. None of the alien enemies have been given a fair opportunity to refute the to them unknown charges against them. Yet we know today of many Germans who were opposed to the Hitler government, that there was an active underground movement against Hitler. We submit that only by individual examination, by trial or fair hearing can it be determined who should be removed, and who should be released.

Denial of a fair hearing condemns petitioner and the other alien enemies for beliefs and teachings to which they may not personally subscribe, and as to many of which they may not even be sure that they know or understand them. That fact alone is enough to invalidate the removal orders. Again we stress: It is not the Legislation which is at fault, but rather the interpretation of the law by the Executive. The evil we complain of can readily be cured by giving each alien enemy a fair hearing in accordance with American standards of fairness and justice.

C. The removal orders deprive petitioner and the other alien enemies of their property without due process of law.

Under the Potsdam Declaration, and the Paris Reparation Agreement of January 24, 1946, as well as the Agreement reached at Brussels, on November 21, 1947, by the Inter-Allied Reparation Agency, the property of petitioner, and of all the other alien enemies ordered removed, is subject to confiscation as reparations. Article 6A of the Paris Agreement provides that each country shall hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German

ownership or control. Assets subject to seizure are, among others, those of:

"• • •

3. An individual who, as a German national, has been compulsorily repatriated to Germany since January 24, 1946, or is intended to be compulsorily repatriated to Germany."

Under this provision any of the alien enemies ordered removed is subject to loss of his life savings, as is actually the situation in the case of one man who slaved in bakeries for some 20 years, whose savings account has been "blocked", and is subject to seizure by the Alien Property Custodian, solely because there is a removal order outstanding against him. This presents a clear case of depriving the aliens of their property without due process of law.

D. The removal orders are invalid because they were made by the Attorney General, and not by the President who could not lawfully delegate to the Attorney General a judicial function.

Section 1 of the original Alien Enemy Act authorizes the President to direct the conduct to be observed on the part of the United States toward alien enemies. He is given summary discretion. When limited to internment his action is conclusive and not subject to judicial review. But the proviso in Section 1, and the language of Section 2 providing for full examination and hearing by a court in the cases of aliens *resident within the United States* shows that Congress intended residents to be treated differently than those who were not residents.

The Proclamation dated July 14, 1945 shows that the President has attempted to delegate to the Attorney General the power to decide who is dangerous. The wording of the Proclamation is: "who shall be deemed

by the Attorney General to be dangerous * * *". Deemed means to form a judgment, to have an opinion, to judge, to sit in judgment on. To deem is to exercise a judicial function. The Alien Enemy Act imposes that function on the President. It does not authorize him to delegate this judicial function.

When by express statutory declaration it is evident that the personal individual judgment of the President is required to be exercised, the duty may not be transferred by the President to any one else.

Runkle v. *U. S.*, 122 U. S. 543;
Weeks v. *U. S.*, 277 F. 549, 578, Affd. 259 U. S. 336;
Meyers v. *U. S.*, 272 U. S. 52;
U. S. Chemical Foundation v. *U. S.*, 272 U. S. 1.

Nor can the powers of the Legislature be delegated. The definition of offenses, the classification of offenders, and the prescription of penalties are legislative and not executive functions. *U. S.* v. *Eleven Thousand Pounds Butter*, 195 Fed. 657, Affmg. 188 Fed. 157. The power of administrative officers to prescribe regulations does not carry with it the power to make law. *U. S.* v. *Powell*, 95 Fed. 2d 752; Cert. denied, 305 U. S. 619.

Nor can a right granted by the Legislature be limited or defeated by a rule adopted by the Executive. *Klein* v. *U. S.*, 13 Cust. Ct. App. 273. The Executive can act only subordinate to the judicial department, where rights of persons or property are concerned. The duty of the Executive in those cases consists only in aiding to support the judicial process, and enforcing its authority, when its interposition for that purpose becomes necessary. *Kentucky* v. *Dennison*, 65 U. S. 66.

Article I, Section 1 of the Constitution provides that "all legislative Powers herein granted shall be vested in a Congress of the United States, * * *. Determination

of the meaning of Congressional Acts is a judicial function which is beyond the power of control of the Executive." *Walker* v. *U. S.*, 83 Fed. 103. An administrative regulation may not be used to amend the plain terms of a statute under guise of interpreting it. *R. E. Schanzer* v. *Bowles*, 141 Fed. 2d 262.

The Government's interpretation of the Alien Enemy Act constitutes an improper delegation of a judicial function to the Attorney General, enabling him, rather than the courts, to sit in judgment. Since the Attorney General is the arresting officer, this is tantamount to making the Executive the law-maker, the prosecutor, the judge, and the executor of his own policy, all contrary to our fundamental principle of separation of powers.

We submit that War Powers are subject to constitutional limitations; that the Alien Enemy Act must be read as a whole, and that when so read makes specific provision for a trial or fair hearing before removal of aliens who are residents; that this was the intent of Congress when the Alien Enemy Act originally was adopted in 1798, and certainly when Congress enacted the law of May 10, 1920 requiring a hearing for all aliens to be deported under Section 4067 of the Alien Enemy Act; that Congress having thus expressed its intent, and having thus interpreted the Alien Enemy Act the Executive is bound thereby.

In insisting on due process of law for enemies we do not wish to favor enemies as against our Government. We simply have in our mind Tom Paine's maxim:

> "He that would make his own Liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent, that will reach himself."

IV.

When the orders of removal were issued, there was no longer a "war" and appellants were no longer "alien enemies" as defined in the Act of July 6, 1798.

At the outset, it should be made clear that the powers of the Executive with respect to removal are comparable neither to the powers of court-martial, nor to the powers authorizing the punishment of war criminals (see *Kahn* v. *Anderson*, 1921, 255 U. S. 1, 9; *Matter of Yamashita*, 1946, 327 U. S. 1, 9-11, relied on in *United States ex rel. Schlueter* v. *Watkins, supra*). The power of the Executive to direct removal flows exclusively from the Alien Enemy Act of July 6, 1798.

A study of the congressional debates which preceded the passage of this Act in 1798 will establish beyond question that in using the words "declared war" and "hostile nation or government," the legislators had in mind "war in fact" or "actual hostilities" and not a mere technical "state of war."

When this act was written in the Spring of 1798, two grave problems faced the legislators. One was the tremendous power being asserted over all Europe by the French, a power which even then threatened to spread across the Atlantic and engulf the United States (see *Bas* v. *Tingy*, 1800, 4 Dallas 37, at 40). The other, was the serious internal struggle between the States and the Federal Government for the control of migration of aliens. As Albert Gallatin pointed out during these very debates

> "* * * by turning to the 9th section of the Constitution, it is found that the migration of such persons [aliens] as any of the States shall think proper to

admit, shall not be prohibited by Congress prior to the year 1808."[1]

Thus, on the one hand, there was the desire to give the Executive the power to deal with French nationals in the case of actual hostilities without a declared war. And on the other, there was the recognition that until 1808, the power over aliens rested exclusively with the States, except in the case of a "declared war." So strong was the legislative intent that the Executive should have the power in the case of actual hostilities, and only in such event, that it is most doubtful that the words "declared war" would have ever appeared in the statute but for the constitutional problem existing until 1808.

Albert Gallatin described this dilemma when speaking with respect to a motion of Congressman Sitgreaves, who had suggested that the aliens who should be subject to removal, should be natives, citizens, etc., of any nation which had "declared hostilities against the United States." Responding to the motion, Albert Gallatin said, at pages 1581-2 of the Congressional Record for Thursday, May 3, 1798:

> "He would suggest to his colleague that part of the Constitution which might be in the way of this motion. A distinction was made by it between actual hostility and war.
>
> If it had only gone to have made a difference between *declared* and *actual* war, by striking out the word 'declare,' it would have removed the [Constitutional] objection. If there be a difference between a state of war and actual hostility, there is also a difference in the relation between alien subjects of a nation with whom we are at war, and those of a nation with whom we are in a state of actual hostility."

[1] 2 Annals of Cong., 5th Cong., 2d Sess. 1581.

Because the legislators finally adopted the phrase "declared war" in order to afford the *Federal Government* with the necessary constitutional authority, it does not follow that they intended that the *Executive* should possess this extraordinary power at times other than "actual hostility" or "war in fact."

That Congress intended this power of the Executive to be coterminous with actual hostilities is demonstrated beyond question by the principal debates. Congressman Otis of Massachusetts, the leading proponent of the bill, spoke of its purpose, as follows:

> "It is proposed by this resolution to give the President the power to remove aliens, when the country from which they came shall threaten an invasion."[2]
>
> . . . . .
>
> "Gentlemen talk about a declaration of war. No such thing scarcely ever precedes war. War and the declaration of war come together, like thunder and lightning. Indeed, if France finds she can enfeeble our councils by refraining to declare war, and that we will take no measures of effectual defense until this is done, it is probable she will not declare it, but continue to annoy us at present."[3]

Further indication of the fact that the legislators were thinking of war in terms of actual hostilities was the statement of Congressman Sewall, himself an outspoken opponent of the bill,

> "France, said he [Mr. Sewall], has now done towards the United States what might be considered as *hostility*. Suppose we pass a law which calls upon the President to act, what ought the President to do?

[2] 2 Annals of Cong., 5th Cong., 2d Sess. 1575 (1798).
[3] 2 Annals of Cong., 5th Cong., 2d Sess. 1581.

> Was he to determine the point whether France has authorized *hostilities* against the United States?"[4]

Almost conclusive proof that the legislators were aiming to limit the powers of the President is an amendment which Congressman Allen proposed and was thereafter obliged to withdraw.

> "Mr. ALLEN said, he would move an amendment which would supersede that under consideration, by making the resolution extend to *all aliens* in this country. He wished to retain none of the restraints which are in the present resolution."[5]
>
> . . . . . .
>
> "It did not appear to him necessary to have the exercise of this power depend upon any contingency, such as a threatening of invasion, or war, before it could be exercised. He wished the President to have it at all times. He moved an amendment to this effect, which went to enable the President to remove at any time the citizen of any foreign country whatever, not a citizen, regarding the treaties with such countries."[6]

That the legislators intended that war as included in the Alien Enemy Act should be "war in fact" and not a technical "state of war" is conclusively established by their failure to adopt those very terms. They were proposed in a motion by Congressman Sewall to define those aliens who should be subject to the liabilities of this act as those of a government

> "between which and the United States shall exist a state of war."[7]

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[4] 2 Annals of Cong., 5th Cong., 2d Sess. 1575 (1798).
[5] 2 Annals of Cong., 5th Cong., 2d Sess. 1578 (1798).
[6] 2 Annals of Cong., 5th Cong., 2d Sess. 1578 (1798).
[7] 2 Annals of Cong., 5th Cong., 2d Sess. 1580 (1798).

Congressman Otis strongly opposed this definition of "war" on the ground that it might not permit the use of the power in a case of actual hostilities apart from a state of war.[8] He had previously stated:

> "* * * that *in a time of tranquillity, he should not desire to put a power like this into the hands of the Executive*; but in a time of war, the citizen of France ought to be considered and treated and watched in a very different manner from citizens of our own country."[9]

Were there any question as to the intent of the legislators at that time, the Court is respectfully referred to James Madison's report on the Virginia Resolutions, which is quoted from by Judge Rifkind in the *Schlueter* case, at 67 F. Supp. 564, as follows:

> "* * * much confusion and fallacy have been thrown into the question, by blending the two cases of aliens, members of a *hostile* nation; and aliens, members of friendly nations."

In the light of this record, there can be no doubt that Congress in passing the Alien Enemy Act and in using the words "declared war" and defining who were subject to removal as natives, etc., of a "hostile government or nation" were granting the Executive these extraordinary powers solely during times of actual hostilities or "war in fact" and not during the tranquillity of a theoretical "state of war."

This undoubtedly was what led United States Attorney General Gregory to the conclusion expressed in his opinion to Congress after the first war. The reasons for adopting his view are even more compelling after this war. Unlike the Armistice of the first war, in this war the termination of hostilities was carried out by the unconditional surrender of all forces under German control.

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[8] 2 Annals of Cong., 5th Cong., 2d Sess. 1581 (1798).
[9] 2 Annals of Cong., 5th Cong., 2d Sess. 1791 (1798).

The military surrender was followed by a Presidential Proclamation on May 8, 1945 reading in part as follows:

"By the President of the United States of America

A Proclamation

The Allied armies, through sacrifice and devotion and with God's help, have won *from Germany a final* and unconditional surrender." (Dept. of State Bull., Vol. XII, No. 307, p. 886, May 13, 1945.)

On June 5, 1945, the Department of State of the United States Government, officially declared the total demise of the German State in a proclamation reading in part as follows:

"Department of State

June 5, 1945.
No. 480

Confidential release for publication at 11:00 A. M., E. W. T., Tuesday, June 5, 1945. Not to be previously published, quoted from or used in any way.

Declaration

regarding the defeat of Germany and the assumption of supreme authority with respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom and the Provisional Government of the French Republic.

The German armed forces on land, at sea and in the air have been *completely defeated* and have surrendered unconditionally and Germany, which bears responsibility for the war, is no longer capable of resisting the will of the victorious Powers. The unconditional surrender of Germany has thereby been effected, and Germany has become subject to such requirements as may now or hereafter be imposed upon her.

There is no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers. . . .

. . . . .

The Representatives of the Supreme Commands of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the French Republic, hereinafter called the 'Allied Representatives,' acting by authority of their respective Governments and in the interests of the United Nations, accordingly make the following Declaration:—

The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, *hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government*, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany."

. . . . .

On October 29, 1945, the Allied Control Council for Germany issued Proclamations No. 1 and No. 2 with respect to its powers and activities over Germany and German nationals. These proclamations read in part, as follows:

"PROCLAMATION No. 1

To the people of Germany:

. . . . .

I

As announced on 5 June 1945, supreme authority with respect to Germany has been assumed by the

Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom, and the Provisional Government of the French Republic.

II

In virtue of the supreme authority and powers thus assumed by the four Governments the Control Council has been established and supreme authority in matters affecting Germany as a whole has been conferred upon the Control Council.

* * * *

Done at Berlin, 30 August 1945.

DWIGHT D. EISENHOWER
General of the Army

B. H. ROBERTSON,
Lt. Gen.
Deputy for:
BERNARD L. MONTGOMERY
Field Marshal

L. KOELTZ
General de Corps d'Armee
pour P. KOENIG
General de Corps d'Armee

G. ZHUKOW
Marshal of the Soviet Union"

* * * *

"PROCLAMATION No. 2

* * * *

SECTION III

* * * *

6. The Allied Representatives will give directions concerning the abrogation, bringing into force, revival or application of any treaty, convention or other international agreement, or any part or provision thereof, to which Germany is or has been a party.

7. (a) In virtue of the unconditional surrender of Germany, and as of the date of such surrender, the diplomatic, consular, commercial and other *relations of the German State with other States have ceased to exist.*

* * * * *

8. (a) German nationals will, pending further instructions, be prevented from leaving German territory except as authorized or directed by the Allied Representatives.

(b) German authorities and nationals will comply with any directions issued by the Allied Representatives for the recall of German nationals resident abroad, and for the reception in Germany of any persons whom the Allied Representatives may designate."

In view of the foregoing proclamation and in view of the official declaration of the Department of State previously quoted, declaring the complete demise of the German Government, the cessation of actual hostilities and the assumption of *supreme authority* by the Allied Powers as to every function of the former German Government, it is respectfully submitted that not later than October 29, 1945, the *political branch* of the United States Government had ended the war with Germany so far as the Alien Enemy Act of 1798 is concerned.

By May, 1946, when the orders of removal as to petitioner and the other detainees were issued, there was neither any "hostile nation or government" of which they were native or citizens, nor any such entity against which the United States could any longer be at war within the purport of the Alien Enemy Act.

This Court has held that a proclamation of the President is sufficient to mark the close of war. In *The Protector* (1871), 12 Wal. 700, 702, the Chief Justice said:

"It is necessary, therefore, to refer to some public act

of the political departments of the government to fix the dates;"

* * * *

"The proclamation of intended blockade by the President may therefore be assumed as marking the first of these dates, and the proclamation that the war had closed, as marking the second."

To the same effect see *Adger* v. *Alston* (1872), 15 Wal. 555, 560; *Brown* v. *Hyatts* (1872), 15 Wal. 177, 184.

Not only can war be ended by presidential proclamation, but it can end by "subjugation" as well as by formal treaty of peace, as stated by Oppenheim, *II International Law* §§ 261, 262:

"* * * a war may be terminated in three different ways. Belligerents may, first, abstain from further acts of war and glide into peaceful relations without expressly making peace through a special treaty. Or, secondly, belligerents may formally establish the condition of peace between each other through a special treaty of peace. Or, thirdly, a belligerent may end the war through subjugation of his adversary."

* * * *

"§ 262. The regular modes of termination of war are treaties of peace or subjugation, * * *."

The present war has been terminated by subjugation. As Mr. Byrnes, Secretary of State, formally proclaimed at the Conference of Foreign Ministers in Paris on July 1, 1946:

"While *there is no German Government with which a peace treaty can be made*, it is of the utmost importance that the Allies should without delay agree among themselves upon the peace settlement which they wish to have German authorities accept."

* * * *

"It is not necessary that there be at that time a German government to accept the settlement. It is essential that the Allies be agreed upon a peace settlement in order that the Allies should know the kind of settlement toward which the Allied occupation and administration should be directed until a German government can be created to accept that settlement."

In simple everyday language, this war, as defined in the Alien Enemy Act, has ended because the enemy has been wholly annihilated—the subjugation is complete.

In this connection, particular emphasis is placed on the Presidential Proclamation of May 8, 1945, stating that there had been won "from Germany a *final* and unconditional surrender". In other words, the President has made "public proclamation of the event" (see Sec. 1, Act of July 6, 1798), that so far as Germany is concerned, no further act of war or peace can be done. The capitulation is *final*. When this extraordinary event was followed by the official proclamation of the United States Department of State that the four Powers were assuming all functions of the extinct German Government, the political branch of the Government has most certainly declared an end to the war as provided in the Alien Enemy Act.

This aspect of *political* action is emphasized because it has been the practice of the courts in cases dealing with the Alien Enemy Act to avoid the issue of war termination by stating that this is a political question.

For example, in *United States ex rel. Hack* v. *Clark* (C. C. A. 7th, 1947), 159 F. 2d 552, at 554, it is stated:

"Whether the country from whence he came is still at war with the United States or is still in existence as a sovereign power is not for any court to say; *that is a political question to be answered only by those branches of our Government charged with the*

responsibility of political decisions, namely, the executive and legislative branches. *Jones v. United States*, 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691; *Citizens Protective League* v. *Clark, supra.*"

There is no disagreement with the principle asserted in this line of decisions. On the other hand, where the political branch of the Government has taken the steps proclaiming the *final defeat*, the complete demise and the substitution of its own power in the place of the hostile nation or government, that action compels judicial recognition in the application of a statute such as the Alien Enemy Act.

In Japan the Emperor and his government still function, although they have surrendered. But the government of Germany has been abolished and the existence of Germany as a sovereign state has been destroyed. Hans Kelsen, an authority on international law, in the American Journal for International Law, July 1945, in an article entitled "The Legal Status of Germany According to the Declaration of Berlin", writes:

> "By abolishing the last government of Germany the victorious powers have destroyed the existence of Germany as a sovereign state. Since her unconditional surrender, at least since the abolishment of the Doenitz Government, Germany has ceased to exist as a state in the sense of international law. Germany having ceased to exist as a state, the status of war has been terminated, because such a status can exist only between belligerent states. Since Germany's surrender, at least since the abolition of the Doenitz Government, the Hague Regulations are not applicable, and the legal status of the territory occupied by the victorious powers cannot be that of belligerent occupation."

The mere fact that power is bestowed upon the Executive during a period of actual emergency does not justify usurping it to accomplish purely political objectives when the time of military danger has passed. During an emergency there can be no question of the necessity of giving the Executive power to intern any alien enemy. Internment is a temporary protective measure, and ceases when the danger has passed. Removal on the other hand is not a temporary, but a permanent measure. Its consequences are too serious to permit the Executive to order removal without at least giving the alien enemy an opportunity to be heard and to disprove false accusations.

If the Alien Enemy Act, as originally passed, be read in that light it will be seen that Congress gave the Executive the power to intern all alien enemies as an emergency protective measure, but provided for a full examination and hearing in the cases of alien enemies resident within the United States before they could be removed. Thus the country as well as the vested rights of alien enemies resident within the United States were protected.

V.

The orders of removal are violations of the constitutional prohibition of bills of attainder.

Bills of attainder are generally directed against individuals, but they may be directed against a whole class. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death the act is termed a bill of paine and penalty. Within the meaning of the Constitution, bills of attainder include bills of paine and penalties. In these the legislative body, in addition to its legitimate functions, exercises the powers and office of judge.

Bills of attainder are such special acts of legislation as inflict punishment or paine or penalties upon persons

supposed to be guilty of high offenses, without any conviction in the ordinary course of judicial proceedings.

Cummings v. *Missouri*, Mo. 1867, 4 Wall. 323;
Anderson v. *Baker*, 23 Md. 623;
Fletcher v. *Peck*, Mass. 1810, 6 Cranch 138.

We submit that the removal order served on Relators herein without a fair hearing is a bill of attainder if the Government's contention that they are not entitled to hearings or trials is upheld. The Alien Enemy Act construed in that manner is equivalent to a bill of attainder and therefore unconstitutional. On the other hand if the Relators are given a trial on complaint made, or a hearing as provided in the Act of May 10, 1920, they will then enjoy the privilege of due process of law, and cannot complain that the Alien Enemy Act is unconstitutional because it denies them due process of law.

VI.

The removal orders are invalid because they are issued in violation of the terms of international treaties to which the United States is a party.

The removal order served on petitioner was issued without trial or fair hearing, and in violation of international treaties to which the United States is a party. They are:

(a) Treaty of Friendship, Commerce and Consular Relations between the United States and Germany, dated December 8, 1923, proclaimed October 14, 1925. 44 Stat. 2132.

(b) Extradition Treaty between the United States and Germany, signed July 12, 1930. 47 Stat. 1862.

(c) Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro September 2, 1947.

(d) The Geneva Convention of 1929.

(e) The Hague Conventions.

A. Treaty of Friendship with Germany of October 14, 1925.

This Court on June 9, 1947 in *Clark* v. *Allen*, 91 Ad. Op. 1285 held that the Treaty of Friendship, Commerce and Consular Rights with Germany, signed December 8, 1923, was not abrogated.

The State Department in a letter to the Attorney General dated May 21, 1945 stated that it considered the treaty provisions of the Treaty of 1923 as in force during the war with Germany.

Article I of the Treaty of 1923 provides in part:

> "• • • The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well as for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law."

Yet Respondent claims that petitioner has no right to a trial or a fair hearing, even though liberty, family and property rights are involved.

The proviso in Section 1 of the Alien Enemy Act established petitioner's right to a full examination and fair hearing before a court, or an administrative tribunal. Congress certainly provided for a hearing in removal cases in the Act of May 10, 1920. The Constitution and all treaties made under it are the supreme law of the land. The Treaty of 1923 provides freedom of access to the courts for the prosecution as for the defense of petitioner's rights. Therefore, if for no other reason, the Treaty of 1923 entitles petitioner to a fair trial or hearing on the merits. He has had neither. Therefore, the

removal order is invalid. (*Flensburger* v. *U. S.*, 59 Fed. 2d 464, cert. den. 286 U. S. 564.)

B. The Extradition Treaty signed July 12, 1930.

On July 12, 1930 the United States and Germany signed an Extradition Treaty (47 Stat. 1862), which provides that persons cannot be extradited if they are accused of a political offense. Petitioner is not charged with any crime or violating any law of the United States or Germany. Respondent simply accuses him of "adhering" to an enemy government. That enemy government no longer exists. It has been replaced by the Allied Control Council. If the German government still were in existence, the treaty would prohibit extradition because petitioner's offense, if any, is strictly political. On the other hand if the Allied Control Council be considered petitioner's enemy, then extradition is improper, because again it is strictly for a political offense, and would subject petitioner to punishment by his political enemies for his political beliefs.

In the case of Horn, an alien enemy interned in the United States in 1917, for whose extradition Canada applied, the Department of Justice considered doubtful its authority to deliver Horn to Canadian authorities.

In the case of Franz Rintelen, a German subject, held as a prisoner of war in England, whom the United States wished to extradite from England, the British government opposed the extradition. (Hackworth's Digest International Law, Vol. 4, pp. 66-68.)

In the absence of an extradition treaty there is no obligation to deliver to another nation a fugitive from justice, *U. S.* v. *Rauscher*, 119 U. S. 407. The only authority for extradition of petitioner, if there be such authority, must be found in the extradition treaty with Germany. Its provisions forbid extradition for a political

offense. Petitioner is not a fugitive. At most he can be said to be charged with a political offense. Therefore he cannot be extradited.

We concede that Respondent is avoiding the use of the word "extradition", just as he is avoiding the use of the word "deportation". A rose by any other name smells just the same. Calling the procedure a "removal" does not change the fact that Respondent is attempting to do indirectly what the law forbids him to do directly.

C. Inter-American Treaty of Reciprocal Assistance.

The United States ordered the removal of petitioner, and then prevented him and others from going to any country of his choice by requesting all American Republics and European and Far- and Near-East Governments to refuse to issue him a visa, or a permit to immigrate (Appendix A and B). In doing so it relies upon the Act of Chapultepec, adopted in Mexico City in March 1945, which is neither a law, nor a treaty, nor even an executive agreement. It is merely a recommendation, which has never been submitted to, nor ratified by Congress. It was an emergency wartime measure. The State Department Bulletin for November 23, 1947 at page 983 says:

> "The Act of Chapultepec was, however, a temporary wartime measure in the form of a simple resolution and was concluded prior to the time when the adoption of the Charter of the United Nations set the permitted patterns for regional security arrangements."

The regional security arrangements referred to have been made in the form of the Inter-American Treaty of Reciprocal Assistance signed at Rio de Janeiro on September 2, 1947. In it

> "• • •
>
> "The High Contracting Parties reaffirm the adherence to the principles of inter-American solidarity

and cooperation, and especially to those set forth in the preamble and declarations of the Act of Chapultepec, all of which should be understood to be accepted as standards of their mutual relations and as the juridical basis of the Inter-American System;

"• • •

"the American regional community affirms as a manifest truth that juridical organization is a necessary prerequisite of security and peace, and that peace is founded on justice and moral order and, consequently, on the international recognition and protection of human rights and freedoms, on the indispensable well-being of the people, and on the effectiveness of democracy for the international realization of justice and security."

On April 12, 1946 the Emergency Advisory Committee for Political Defense, approved RESOLUTION XXVII ON THE EXPULSION AND NON-ADMISSION OF DANGEROUS PERSONS. This resolution contains the standards by which it judges whether a person is dangerous. This Committee issued a policy directive stating "that discriminatory measures must be taken against Axis nationals" (Committee's Annual Report, July 1943, p. 10) and in its Second Annual Report covering July 1943 to October 1944 freely admitted:

"Concerning the present program of the authorities for the revocation of the naturalization of disloyal citizens, the Committee's delegation was informed that this program has been expressly limited for reasons of policy to individuals whose former nationality was that of an enemy country so that they could be interned as alien enemies after their naturalization was canceled" (p. 121).

In view of this attitude by the committee we may assume that the standards approved in Resolution XXVII

are not too lenient, let alone judging them by democratic standards of justice and fairness. Yet even the standards set forth in Resolution XXVII have been violated in determining that petitioner is subject to removal. Said standards are in part as follows:

"• • •

"A. CRITERIA FOR DETERMINING WHETHER A PERSON IS DANGEROUS.

The fundamental problem in this matter consists in establishing uniform standards that will serve all the American Governments in determining whether a person is dangerous. In the application of these norms and criteria, there should be considered not only the present danger but also the potential danger of the individual.

These criteria as to who is a dangerous person will indicate when measures of expulsion or non-admission are to be decreed except where there exist certain special circumstances which are mentioned below.

1. • • •

• • • •

However, the criterion by which expulsion is to be decided upon should be stricter than that applied in some countries for internment, in as much as the latter constituted a preventive measure of military security against imminent dangers of sabotage and violence.

• • • • •

2. *Circumstances that exempt from expulsion or suspend the effects of this measure.*

The committee suggests, with respect to the less dangerous persons only, that there be taken into account certain special circumstances as mentioned below.

a. *Exempting circumstances.*

(1) *Adherence to the Axis by coercion.* In certain cases, a person who has engaged in activities which give evidence of his adherence to the Axis will be able to prove that he acted against his will or under threat. • • •

In its milder form, coercion was exercised by means of economic pressure, as for example, the boycotting by German communities in America of those who were reluctant to support Axis plans. • • •

Bearing in mind the repeated perpetration of these abominable acts, the Committee recommends that those persons who invoke this excuse be granted a hearing and other opportunities necessary to attempt to prove coercion. • • •

(2) *Retractation of adherence to the Axis.* The Committee recommends, likewise, that there be taken into account the case of those persons who have committed themselves in favour of the Axis in any of the activities referred to in this Resolution, but who, prior to or at the time of the aggression against this Hemisphere, have demonstrated that they have definitively broken all ties with such activities.

• • • •

b. *Personal or family situation.*

In cases where, on account of expulsion or repatriation, the life of the person expelled might be seriously endangered because of illness or advanced age, it is also advised that the measure be suspended.

Another special circumstance, among those most frequently invoked to escape expulsion, is that the spouse or children of the dangerous person are nationals of an American Republic. In this Resolution, (subsection c) of Section 3), such a situation is contemplated.

• • • •

c. *Long residence.*

"Several American Republics have considered the possibility of fixing a minimum period of residence that would prevent expulsion."

* * * *

It will be noted that the resolutions quoted above provide for a hearing. Yet Respondent insists he does not have to give petitioner a hearing, and therefore he may not complain about an unfair hearing.

The personnel which constituted the Attorney General's hearing board, which ordered petitioner removed, were the same persons who made the rules, served on, or consulted with, the Emergency Advisory Committee for Political Defense. The original hearing board was Edward J. Ennis, Chief Alien Enemy Control Unit, Department of Justice, his assistant John L. Burling, and C. Edward Rhetts, Special Assistant to the Attorney General. After Ennis's resignation his place was taken by Thomas H. Cooley, II. (Page 151 of the Emergency Advisory Committee's Report for 1944.)

Resolution XXVII paid lip-service to the principles of democratic fairness by providing for a hearing. The hearings were prejudged, and were anything but fair. The proceeding throughout was totalitarian. When motions were made to compel the Government to produce its files in the *Schlueter* case so that we could show the Court there were no valid charges, or any evidence which would justify Schlueter's deportation or removal, the purge-trial principles underlying these removals were revealed by the Government's plea that Schlueter could not complain about an unfair hearing since he was not entitled to any hearing.

The cases of many aliens detained on Ellis Island show that the exemption from removal stated in Resolution XXVII has been ignored. Several of the detainees are married to native-born citizens, others are the fathers of

native-born minor children dependent on them for support, and still others are in such ill health that it has been deemed advisable to extend their paroles, lest they, like others before them, die while detained on Ellis Island. Others of the detainees were citizens, who were denaturalized by default judgments while imprisoned after conviction in the Bund conspiracy trial, reversed by this Court in May 1945. Having lost their citizenship without a trial, while in prison, they now, though stateless, are to be "removed" to Germany.

Not only have the provisions of Resolution XXVII been conveniently disregarded whenever it suited the Government officials, but they have also deliberately ignored the very provisions of the Presidential Proclamation 2526 respecting the treatment of alien enemies. That proclamation dated December 8, 1941 provides in part:

> "All alien enemies shall be liable to restraint, or to give security, or to remove and depart from the United States in the manner prescribed by sections 23 and 24 of Title 50 of the United States Code, and as prescribed in the regulations duly promulgated by the President."

Are we to assume that reference to Sections 23 and 24 of Title 50 appear in said Presidential Proclamation solely to give lip-service to respect for law? In those days we were still being beguiled with nice words about and repeated references to the Atlantic Charter, and the better world which it would bring. We realize it is now said that there never was an Atlantic Charter. Such an assertion cannot be made about Sections 23 and 24. They were then and still are law.

VII.

The removal orders are invalid because they are based on the charge that Relators have adhered to the enemies of the United States, which charge is defined as treason by the Constitution, and requires proof by two witnesses.

The Constitution defines adherence to the enemy as treason. Treason is a breach of allegiance. Allegiance is of two kinds: that due from citizens, and that due from aliens *resident within the United States.* Allegiance is the obligation of fidelity and obedience which the individual owes to the government under which he lives, in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. Every sojourner who enjoys our protection is bound to good faith toward our Government, and although an alien, he may be guilty of treason. Aliens domiciled in the United States owe a local and temporary allegiance which continues during the period of residence. As long as they continue to reside here, they owe obedience to our laws and may be punished for treason as a native-born citizen might be.

Young v. *U. S.*, 97 U. S. 39, 62;
Carlisle v. *U. S.*, 83 U. S. 147, 154;
Rex v. *Jameson*, (1896) 2 Q. B. 425, 430;
Blackstone's Commentaries, 1st Ed., Vol. I, 357;
Wm. Joyce v. *Director of Public Prosecutions*, Law Rep. App. Cases, Part VIII, Aug. 1946, p. 347.

The case of Wm. Joyce, better known as Lord Haw-Haw, is squarely in point. In that case the question to be decided by the Court was whether an alien domiciled in England for about 24 years owed any allegiance to England, and whether he could be guilty of treason for acts

committed outside the realm. Because it involved fundamental issues the case was appealed to the House of Lords, which held:

> "* * * an act is treasonable if the actor owes allegiance, and not treasonable if he does not. It is a question of allegiance. Allegiance is owed * * * by those who, being aliens, reside within the King's realm. * * * All who were brought within the King's protection were *ad fidem regis;* all owed him allegiance. The natural born subject owes allegiance from his birth, the naturalized subject from his naturalization, the alien from the day he comes within the realm. * * *
>
> Local allegiance is founded in the protection a foreigner enjoyeth for his person, his family or effects, during his residence here; and it ceaseth, whenever he withdraweth with his family and effects."

Petitioner as well as all the other alien enemies legally immigrated to the United States and established their domiciles here many years ago. Many are married to United States citizens, and are the parents of native-born children. Therefore they owe local allegiance to the United States. Throughout the war they were here. The removal orders state that they have "adhered" to the enemies of the United States. This is equivalent to charges that they have committed treason. Treason requires proof, which presupposes a trial, or at least a fair hearing. They have had neither.

VIII.

There is no proof before the Court nor before the Attorney General that petitioner or any of the alien enemies are dangerous.

We have represented more than one hundred alien enemies who were interned. Throughout the court proceedings the United States Attorney always informed the judges that the only question before them was whether the alien was an enemy; that it was not their province to ask for, and that the Attorney General was under no duty to submit to the Court, any proof that the alien enemy was in fact dangerous. Therefore we maintain that as respects petitioner's and all other alien enemy cases now before this Court, the words of Judge Bright in the Southern District uttered in one of these cases apply: "There is no proof before this court that this man is dangerous".

In fact many of these so-called dangerous alien enemies were voluntarily employed during wartime on railroads and in United States forests. The records of the courts show that many aliens interned as enemies were not nationals of enemy countries, but nevertheless were interned in some cases as long as 4 years; that many born in South America had been kidnapped from their homes there, brought here by force and against their will, and ordered interned as dangerous alien enemies. Court action was necessary in those cases to prove that the Attorney General was wrong, and to compel the release of those men. Even when the courts decided they were not enemies and must be released, they were again arrested on the trumped-up charge that they were "illegally" in the United States, and ordered deported to Germany, not to their home countries in South and Central America. If mistakes were made in those cases we are entitled to argue that a mistake may have been made in petitioner's case. We know that mistakes were made in other cases.

Further we are convinced that they were not always honest mistakes. We cite as proof among others the case of Walter Schneller, one of the defendants in the *Keegan Bund Conspiracy* case, who the Government admitted, and this Court said in its opinion, was not connected with the conspiracy. Yet when Schneller was released from prison on June 11, 1945, after three years imprisonment, he was immediately ordered interned by said Ennis on the alleged assumption that he might have been illegitimate and therefore did not derivatively acquire United States citizenship when his father and step-mother were naturalized. This despite the fact that the father had testified to his parenthood of the boy, and that Walter Schneller's brother, naturalized with him on the same day, had died in action in March 1945 while a member of the United States Air Forces. It was that case which convinced us that the conduct of the entire internment program was questionable. Our experience demonstrated that the removal proceedings could not stand airing in open court, and that the Attorney General had no facts on which to base his findings that these aliens were dangerous.

In the cases of those men, now stateless, who were citizens and who were denaturalized during the war, we have repeatedly brought to the attention of the Attorney General's office, and have proven in court, as well as before the Senate Judiciary Committee on July 24, 1947, in the presence of representatives of the Attorney General, that the denaturalization judgments based on Bund membership were obtained by the use of forged documents, known to the Justice Department to be forgeries when used; that in another default case "an address was made" by the Government so as to bring denaturalization proceedings in New Jersey, although the defendant's legal residence was known to the Justice Department to be in Brooklyn, N. Y. These charges have never been denied or refuted. The removal orders in those cases obviously can be en-

forced only by reason of the default denaturalization judgments fraudulently obtained.

We concede that the Government may not be wrong in every case and that there may exist valid reasons why some of these aliens should be removed. But we insist that each alien is entitled to know what the charges are, and to have fair opportunity to refute them, if he can, before he is removed.

IX.

Petitioner's right to voluntary departure has been effectively nullified by the action of the United States in asking all foreign governments not to grant him a visa.

The Alien Enemy Act grants petitioner the right of voluntary departure. The Government well knew of this legal right, but pretended it did not exist and detained petitioner until the Circuit Court of Appeals, Second, in *von Heymann* v. *Watkins*, 159 Fed. 2d 650, affirmed the right of voluntary departure. Appendixes A and B show that long before the *von Heymann* decision the Government circulated lists containing the name of petitioner, and 416 other resident alien enemies, among the other governments, with the request not to issue visas to them.

These facts were not known to petitioner Ludecke, nor to the other alien enemies at the time. They were discovered by us only after diligent search, because the lists had been circulated under diplomatic secrecy. Two trips to South America were necessary before we could conclusively prove the facts. The Government has never denied them. It merely contends that some of the evidentiary material which we obtained is confidential and privileged, and may not be admitted in evidence. The Government maintains it had a right to do what it did.

Therefore on the Government's own contention its acts in attempting to nullify the petitioner's right of voluntary departure present a problem of law.

We do not know whether these issues have actually been raised in the *Ludecke*, or in the *Ahrens* cases, now before this Court. The facts were put into evidence on February 19, 1948 during the hearing on the writ of habeas corpus filed on behalf of the 22 men whom we represent in the Southern District of New York. Judge Conger has not yet rendered his decision in those cases.

Even though these facts may not now be part of the record before this Court we respectfully urge that they should at this time be brought to the attention of this Court so that it may have the entire picture before it The determination of the *Ludecke* and *Ahrens* cases will necessarily be controlling in the cases now before Judge Conger.

The testimony of alien enemy Hubert Jaegeler, who is subject to a removal order, was by stipulation made applicable to all the 22 cases in the Southern District. It shows that he called at practically all the Consulates in the New York area to apply for a visa, and was refused; and that in some Consulates he was actually shown the list containing his name, and told that as long as his name was on the list he could not obtain a visa.

In the cases of *Friedrich* and *Ida Bank*, Judge Bright, in the Southern District, held on August 5, 1947 that they had been prevented from leaving the country by the actions of the State Department, and that he could not agree that the right of voluntary departure does not either by its terms, or by implication, confer upon the petitioner the right to select the country to which he desires to go; that if his departure is to be voluntary it forbids restrictions by respondent, or those through whom he acts, that petitioner must go to Germany, Spain, or some other country in the Eastern Hemisphere.

We urge this Court to apply the same principle in petitioner's case. He, and all the other alien enemies subject to removal orders, have been prevented by the restrictions imposed by our Government from exercising their right of voluntary departure.

Conclusion.

We believe that in the foregoing discussion we have demonstrated that the war powers are subject to constitutional limitations; that the Alien Enemy Act read as a whole makes specific provisions for the protection of those alien enemies who are residents; that Congress provided for a hearing in such cases by the law of May 10, 1920, and that the Executive may not ignore the intent of Congress as thus expressed. To do otherwise amounts to practice of the very totalitarianism we have just fought, and mistakenly thought to have eliminated for all times.

The recent events in Czechoslovakia demonstrate what can happen when constitutional rights are ignored. Benes in 1945 allowed the expulsion from the country of people who had resided there for generations. They were expelled from the country and their farms and not allowed to take with them any of their belongings. Benes ignored constitutional rights and let his totalitarians do as they wished with their political opponents. Having once established the pattern the totalitarians found little opposition when it came the turn of Benes to be stripped of power and made a prisoner of the Communists. How quickly the evil seed sown in 1945 has brought forth weeds.

Lincoln's works, edited by John G. Nicolay and John Hay tell us that Lincoln warned against substituting "furious passions in lieu of the sober judgment of courts" (I, 37). Even in time of war he was "slow to adopt" extreme measures. He did so only because "the public safety" required it (VIII, 303).

Punishment for disloyalty, he noted, should never occur "without regular trials in duly constituted courts under the forms and all the substantial provisions of law and of the Constitution * * *" (VII, 281).

The last mentioned quotation is from Lincoln's veto message dealing with the confiscation act of 1862. In this passage Lincoln was dealing precisely with the 1862 equivalent of a "war-hysteria case".

How far from Lincoln's respect for constitutional rights is the situation presented by the cases now before the Court, which present the very totalitarian practices we have heretofore condemned. These practices are based on the sort of thinking Mr. Justice Jackson had reference to in his address to the American Society of International Law on April 13, 1945 when he said:

> "Of course, there is a school of cynics in the law schools, at the bar and on the bench who will disagree, and many thoughtless people will see no reason why courts, just like other agencies, should not be weapons of policy. It is a current philosophy, with adherents and practitioners in this country, that law is anything that can muster the votes to get put in legislation or directive or decision and backed up with a policeman's club. Law to those of this school has no foundation in nature, no necessary harmony with the higher principles of right and wrong. They hold that authority is all that makes law, and power is all that is necessary to authority. It is charitable to assume that such advocates of power as the sole source of law do not recognize the identity of their incipient authoritarianism with that which has reached its awful climax in Europe."

We cannot do more to stress the importance of these cases than to repeat from the foregoing that the respondent apparently believes his authority is all that is

necessary, because he has the power. In the light of recent events in Europe it is not now difficult to identify such incipient authoritarianism with that which now is reaching an even more awful climax in Europe.

It is charitable to assume that those responsible for this program originaly were true liberals and motivated by a desire to protect and defend democratic institutions from their political opponents. Unfortunately they, like all the rest of us, have proved all too human. Having been in office too long, and therein enjoyed absolute power their liberalism changed to totalitarianism. To them can be applied Pope's words:

> "Vice is a monster of so frightful mien,
> As to be hated needs but to be seen;
> Yet seen too oft, familiar with her face,
> We first endure, then pity, then embrace."

Since this case was tried on February 19, 1948, it is appropriate to call attention to the State Department Bulletin for February 15, 1948, featuring an article on AN INTERNATIONAL BILL OF HUMAN RIGHTS, and the eleven-page pamphlet in support of a human rights covenant issued by the Committee on International Law of the New York City Bar Association, for discussion at the meeting on March 9, 1948. The pamphlet mentions "the hideous disregard for human rights by Hitler", and "prompting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion". But while these matters are being discussed petitioner and all other alien enemies under removal orders are detained in custody because of their political views.

To persecute human beings solely because of their race, or for belonging to some association, be it of a political, religious or cultural nature, was when done by Hitler,

and will always be an act of injustice. It can never become right. Where government believes it can infringe upon this divine law pertaining to all humanity it will have to take into account that in some form or other the Divine Master Builder of this universe will drastically correct it.

Wherefore, we respectfully urge that the writ of habeas corpus herein be sustained.

Respectfully submitted,

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GEORGE C. DIX,
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APPENDIX A.

Memorandum Distributed to Other Governments by Our State Department.

In order to cooperate with the other American republics to secure the safety and welfare of this hemisphere, and to effectuate the principles and policies designed to that end which were adopted by the American republics at the Mexico City Conference, the Government of the United States is prepared to proceed with its program to exclude from this hemisphere dangerous enemy aliens who are presently in the United States.

The Government of the United States, acting through the Department of Justice, has given careful consideration to the cases of a large number of German nationals resident in the United States. After giving each individual an opportunity for a hearing before a board, the Attorney General has determined that 417 persons are dangerous to the public peace and safety of the United States because they have adhered to an enemy government or to the principles of government thereof, and has ordered that they be removed. It is considered that the exclusion from the hemisphere of these individuals will effectuate the purposes of Resolution VII of the Mexico City Conference. A list of the individuals is provided in Enclosure 1.

There is an additional, smaller group of aliens whom the United States desires to include in this program, consisting of German nationals sent to this country from other American republics for security internment during the war. Of the aliens originally brought here from the other republics, a high proportion—about three-fourths—have already been repatriated to Germany with their consent. Of the remaining one-fourth, those from three republics, namely Bolivia, Ecuador and El Salvador, have, upon the request of those governments, been re-

turned to those countries for disposition of their cases; 67 per cent of the rest have been released from confinement by the Government of the United States because after consideration of the information in each case, it was determined that although their internment was justified and probably necessary during hostilities they might now safely be allowed to remain in the hemisphere.

There remain in the custody of the Government of the United States a total of 51 cases from ten countries; the names of these individuals are listed in Enclosure 2. In these cases, after the most careful study of all the available evidence, and after a hearing before a board established by the Department of State, the Secretary of State, acting for the President, had concluded that the continued residence of these individuals in the Western Hemisphere would be prejudicial to the security and welfare of the Americans within the meaning of Resolution VII of the Mexico City Conference, and that accordingly, as contemplated by all the American republics, at that conference, these individuals also should be excluded from the hemisphere.

Since making the determination in these cases, the Government of the United States has received Resolution XXVI of the Inter-American Emergency Advisory Committee for Political Defense, dated April 12, 1946. This resolution, entitled, "On the Expulsion and Non-admission of Dangerous Persons," recommends uniform standards to be applied by every American republic in the conduct of its exclusion program. This Government is pleased to note that the standards which have been applied by the United States to both groups of aliens under discussion approximate closely those recommended by the Committee.

The Government of the United States desires in the near future to issue orders to the persons listed in the enclosures requiring them to depart from the United

States within a period of thirty days, and providing that if hey neglect or refuse so to depart they will be removed to Germany. (This procedure is dictated by the internal laws of the United States under which this program is contemplated.) Before issuing such orders, however, the Government of the United States is desirous of receiving from the other American republics and from the Dominion of Canada assurances that the persons in question will not be permitted to enter their territory. Such assurances by your Government would be greatly appreciated by the Government of the United States as an act of cooperation in the application of Resolution VII. To effectuate these assurances, it is respectfully suggested that precise instructions be sent to the appropriate Consulates in the United States, especially those in New York, New Orleans, and San Antonio or Houston, Texas. The Department of State will gladly furnish copies of the enclosed lists to your Embassy, in Washington for distribution to the Consulates.

It will be noted that of the Germans listed in Enclosure 2, five were brought to this country from Colombia. While the Government of the United States is prepared to discuss the dangerousness of any of the individuals in whom your Government is interested, this Government is pleased to note that its Ambassador has been informed that the Government of Colombia favors the deportation to Germany of four of the five listed. For the sake of convenience and uniformity the name of the fifth individual, Herbert Schwartau, has also been included on the list. This Government is fully aware, however, of your Government's memorandum of March 25, requesting that this individual's deportation be suspended. You may be assured that no action will be taken towards deporting Schwartau without the consent of your Government.

It would be futile for the United States, or for any other American republic, to exclude a dangerous individual if that individual could proceed to another country in the

hemisphere and carry on his activities there. Obviously a program for the exclusion of dangerous persons such as was contemplated by Resolution VIII of the Mexico City Conference, can be effectively carried out only if all the American republics cooperate to that end. The Government of the United States is confident that your Government will act to insure the success of the steps my Government is taking in support of the program to which the American republics committed themselves at Mexico City.

APPENDIX B.

July 1, 1946.

Alcoa Steamship Company,
17 Battery Place,
New York City.

Sirs:

Your attention is called to certain circumstances arising in the conduct of a program in which the Government of the United States is currently engaged.

In Resolution VII of the Final Act of the Mexico City Conference of March 1945, the American republics declared their intention to exclude from the Western Hemisphere Axis nationals whose continued residence in the hemisphere would be prejudicial to the security and welfare of the Americas.

The United States Government has now determined that certain German nationals presently interned in the United States are dangerous to hemispheric or national security. (The names of these German nationals, arranged according to the country in which the individuals resided prior to his internment, will be found in the attached lists.) As a result of this determination, the Government is issuing orders directing these individuals to depart from the

United States within thirty days, and stating that if at the end of that period the alien will not have effected this departure, he will be removed to Germany.

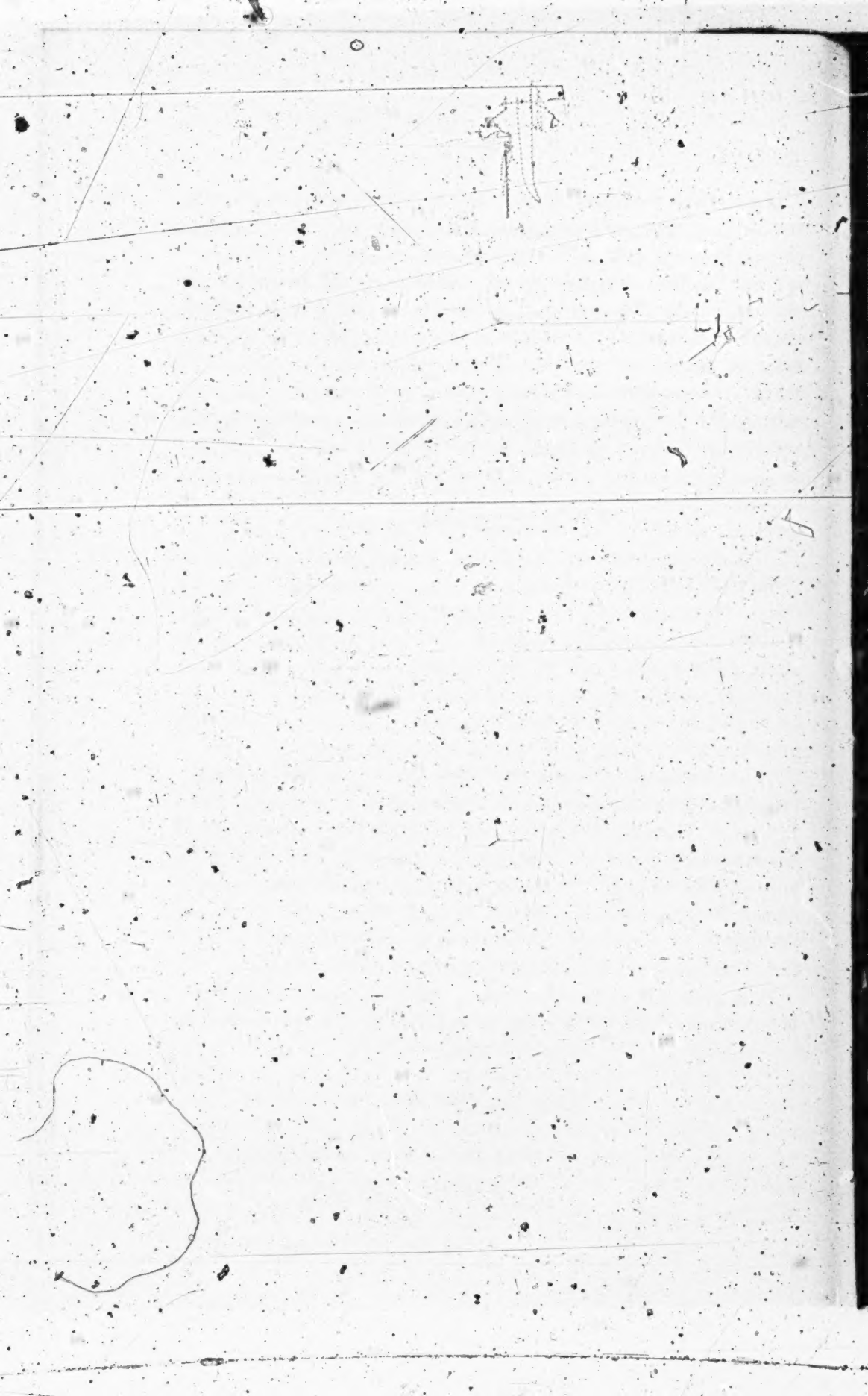
Such orders, signed by the Secretary of State or by the Attorney General, are currently being served on the aliens involved. It is expected that immediately after the service many of the individuals listed, especially among those who previously resided in South or Central America, will apply for transportation to one of the other American republics or to Canada. Some of these aliens will undoubtedly present visas purporting to grant them permission to enter one of these countries. You are informed, however, that the Government of Canada and almost all of the governments of the other American republics have indicated that in order to further hemispheric security they will not grant visas to enemy aliens excluded by the United States, and will nullify any visas already issued to such individuals. It is important, therefore, that you exercise great care in examining visas presented by any of the aliens listed, to make certain that such documents are currently valid, and that it is the present intention of the government which issued the visa to allow the individual to enter its territory. Documents ante-dating June 1, 1946, for example, may, in many instances, prove to have been cancelled by the issuing government. In any case as to which doubt exists, the Alien Enemy Control Section of the Department of State will gladly make the inquiries necessary to determine whether the government in question will admit the individual seeking transportation.

This letter is not to be construed as a request that you deny to any individual transportation to a country which is actually willing to admit him.

Very truly yours,

For the Secretary of State:

LOUIS HENKIN,
Acting Chief,
Alien Enemy Control Section.



SUPREME COURT OF THE UNITED STATES

No. 723.—October Term, 1947.

Kurt G. W. Ludecke, Petitioner, v. W. Frank Watkins, as District Director of Immigration.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 21, 1948.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The Fifth Congress committed to the President these powers:

> "Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside

within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety." (Act of July 6, 1798, 1 Stat. 577, R. S. § 4067, as amended, 40 Stat. 531; 50 U. S. C. § 21.)

This Alien Enemy Act has remained the law of the land, virtually unchanged since 1798.[1] Throughout these one hundred and fifty years executive interpretation and decisions of lower courts have found in the Act an authority for the President which is now questioned, and the further claim is made that if what the President did comes within the Act, the Congress could not give him such power.[2] Obviously these are issues which properly brought the case here. 333 U. S. —.

Petitioner, a German alien enemy,[3] was arrested on December 8, 1941, and, after proceedings before an Alien Enemy Hearing Board on January 16, 1942, was interned by order of the Attorney General, dated February 9,

[1] There have been a few minor changes in wording. We have duly considered these in light of an argument in the brief of the *amici curiae* and deem them without significance.

[2] We are advised that there are 330 alien enemies, ordered to depart from the United States, whose disposition awaits the outcome of this case.

[3] The district court found that:

"The petitioner was born in Berlin, Germany, on February 5, 1890. He was out of Germany for most of the period of 1923 to March 1933. He returned to Germany in March 1933 and became a member of the Nazi party. Later he had some disagreements with other members and as a result he was sent to a German concentration camp, from which he escaped March 1, 1934, after being confined for over eight months. Sometime thereafter he came to this country and published a book, 'I Knew Hitler' ['*The Story of a Nazi Who Escaped The Blood Purge*'—'In memory of Captain Ernst Roehm and Gregor Strasser and many other Nazis who were betrayed, murdered, and traduced in their graves'], in 1937. His

1942.[4] Under authority of the Act of 1798, the President, on July 14, 1945, directed the removal from the United States of all alien enemies "who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States." Proclamation 2655, 10 Fed. Reg. 8947. Accordingly, the Attorney General, on January 18, 1946, ordered petitioner's removal.[5] Denial of a writ of *habeas corpus* for release from detention under this order was affirmed by the court below. 163 F. 2d 143.

As Congress explicitly recognized in the recent Administrative Procedure Act, some statutes "preclude judicial review." Act of June 11, 1946, § 10, 60 Stat. 237, 243. Barring questions of interpretation and constitutionality, the Alien Enemy Act of 1798 is such a statute. Its terms, purpose, and construction leave no doubt. The language employed by the Fifth Congress could hardly be made clearer, or be rendered doubtful, by the incom-

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petition for naturalization as an American citizen was denied December 18, 1939."

The petitioner's attitude was thus expressed in his brief before the district court:

"Fundamentally, it matters not where I live, for I can strive to live the right life and be of service where ever I am. Besides, it may well be a better thing to do the best I can while I can in the midst of a defeated people suffering in body and soul, than to be a futile and frustrated something in the midst of a triumphant people breathing the foul air of self-complacency, hypocrisy, and self-deceit."

[4] No question has been raised as to the validity of these administrative actions taken pursuant to Presidential Proclamation 2526, dated December 8, 1941, 6 Fed. Reg. 6323, issued under the authority of the Alien Enemy Act.

[5] The order recited that the petitioner was deemed dangerous on the basis of the evidence adduced at hearings before the Alien Enemy Hearing Board on January 16, 1942, and the Repatriation Hearing Board on December 17, 1945. The district court which examined these proceedings found that petitioner had notice and a fair hearing and that the evidence was substantial. See also note 8, *infra*.

plete and not always dependable accounts we have of debates in the early years of Congress.[6] That such was the scope of the Act is established by controlling contemporaneous construction. "The act concerning alien enemies, which confers on the president very great discretionary powers respecting their persons," Marshall, C. J., in *Brown* v. *United States*, 8 Cranch 110, 126, "appears to me to be as unlimited as the legislature could make it." Washington, J., in *Lockington* v. *Smith*, 15 Fed. Cas. No. 8448 at p. 760. The very nature of the President's power to order the removal of all enemy aliens rejects the notion that courts may pass judgment upon the exercise of his discretion.[7] This view was expressed by Mr. Justice Iredell shortly after the Act was passed, *Case of Fries*, 9 Fed. Cas. No. 5126, and every judge before whom the question has since come has held that the statute barred judicial review.[8] We would so read the Act if it came before us without the impressive gloss of history.

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[6] See, however, *United States ex rel. Kessler* v. *Watkins*, 163 F. 2d 140; *Citizens Protective League* v. *Clark*, 155 F. 2d 290.

[7] "Such a construction would, in my opinion, be at variance with the spirit as well as the letter of the law, the great object of which was to provide for the public safety, by imposing such restraints upon alien enemies, as the chief executive magistrate of the United States might think necessary, and of which his particular situation enabled him best to judge. . . . I do not feel myself authorised to impose limits to the authority of the executive magistrate which congress, in the exercise of its constitutional powers, has not seen fit to impose. Nothing in short, can be more clear to my mind, from an attentive consideration of the act in all its parts, than that congress intended to make the judiciary auxiliary to the executive, in effecting the great objects of the law; and that each department was intended to act independently of the other, except that the former was to make the ordinances of the latter, the rule of its decisions." *Lockington* v. *Smith*, *supra*, at p. 761.

[8] *Citizen's Protective League* v. *Clark*, 155 F. 2d 290; *United States ex rel. Schluster* v. *Watkins*, 158 F. 2d 853; *United States ex rel. Hack* v. *Clark*, 159 F. 2d 552; *United States ex rel. Kessler*

The power with which Congress vested the President had to be executed by him through others. He provided for the removal of such enemy aliens as were "deemed by the Attorney General" to be dangerous.[8] But such a finding, at the President's behest, was likewise not to be subjected to the scrutiny of courts. For one thing, removal was contingent not upon a finding that in fact an alien was "dangerous." The President was careful to call for the removal of aliens "deemed by the Attorney General to be dangerous." But the short answer is that the Attorney General was the President's voice and conscience. A war power of the President not subject to judicial review is not transmuted into a judicially reviewable action because the President chooses to have that

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v. *Watkins*, 163 F. 2d 140; *United States ex rel. Von Ascheberg* v. *Watkins*, 163 F. 2d 1021; *Minotto* v. *Bradley*, 252 F. 600; *see Lockington's Case*, Brightly (Pa.) 269, 280; *Lockington* v. *Smith*, 15 F. Cas. No. 8448, at p. 758; *Ex parte Graber*, 247 F. 882; *De Lacey* v. *United States*, 249 F. 625; *Ex parte Fronklin*, 253 F. 994; *Grahl* v. *United States*, 261 F. 487; *cf. Banning* v. *Penrose*, 255 F. 159; *Ex parte Risse*, 257 F. 102; *Ex parte Gilroy*, 257 F. 110; *United States ex rel. Di Cicco* v. *Longo*, 46 F. Supp. 170; *United States ex rel. Schwarskopf* v. *Uhl*, 137 F. 2d 863; *United States ex rel. D'Esquivia* v. *Uhl*, 137 F. 2d 903; *United States ex rel. Knauer* v. *Jordan*, 158 F. 2d 337. The one exception is the initial view taken by the district court in this case. It rejected the "contention that the only question that the Court may consider in this habeas corpus proceeding is the petitioner's alien enemy status, although there are cases which give suppport to that view," but held the petitioner had had a fair hearing before the Repatriation Board and that there was substantial evidence to support the Attorney General's determination that petitioner was "dangerous." On rehearing, the court noted that the *Schlueter* case, *supra*, foreclosed the issue.

[8] If the President had not added this express qualification, but had conformed his proclamation to the statutory language, presumably the Attorney General would not have acted arbitrarily but would have utilized some such implied standard as "dangerous" in his exercise of the delegated power.

power exercised within narrower limits than Congress authorised.

And so we reach the claim that while the President had summary power under the Act, it did not survive cessation of actual hostilities.[10] This claim in effect nullifies the power to deport alien enemies, for such deportations are hardly practicable during the pendency of what is colloquially known as the shooting war.[11] Nor does law

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[10] "The cessation of hostilities does not necessarily end the war power. It was stated in *Hamilton* v. *Kentucky Distilleries & W. Co.*, 251 U. S. 146, 161, that the war power includes the power 'to remedy the evils which have arisen from its rise and progress' and continues during that emergency. *Stewart* v. *Kahn*, 11 Wall. 493, 507. Whatever may be the reach of that power, it is plainly adequate to deal with problems of law enforcement which arise during the period of hostilities but do not cease with them. No more is involved here." *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116.

[11] The claim is said to be supported by the legislative history of the Act. We do not believe that the paraphrased expressions of a few members of the Fifth Congress could properly sanction at this late date a judicial reading of the statutory phrase "declared war" to mean "state of actual hostilities." See p. 3, *supra*. Nothing needs to be added to the consideration which this point received from the court below in the *Kessler* case. Circuit Judge Augustus Hand, in this case speaking for himself and Circuit Judges L. Hand and Swan, said:

"Appellants' counsel argues that the Congressional debates preceding the enactment of the Alien Law of 1798 by Gallatin, Otis and others, show that Congress intended that 'war' as used in the Alien Enemy Act should be war in fact. We cannot agree that the discussions had such an effect. Gallatin argued that Section 9 of Art. I of the Constitution allowing to the states the free 'Migration or Importation' of aliens until 1808 might stand in the way of the Act as proposed if it was not limited to a 'state of actual hostilities.' It however was not so limited in the text of the act and it is hard to see how the failure to limit it in words indicated a disposition on the part of Congress to limit it by implication. Otis objected to limiting the exercise of the power to a state of declared war because he thought that the President should have power to deal with enemy aliens in the case of hostilities short of war and in cases where a war was not declared. That Otis wished to add 'hostilities' to the words

lag behind common sense. War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops.[12] See *United States* v. *Ander-*

'declared war,' and failed in his attempt, does not show that Congress meant that when war was declared active hostilities must exist in order to justify the exercise of the power. The questions raised which were dealt with in the act as finally passed were not how long the power should last when properly invoked, but the conditions upon which it might be invoked. Those conditions were fully met in the present case and no question is raised by appellants' counsel as to the propriety of the President's Proclamation of War. There is no indication in the debates or in the terms of the statute that the exercise of the power, when properly invoked, should cease until peace was made, and peace has not been made in the present case. If the construction of the statute contended for by appellants' counsel were adopted, the Executive would be powerless to carry out internment or deportation which was not exercised during active war and might be obliged to leave the country unprotected from aliens dangerous either because of secrets which they possessed or because of potential inimical activities. It seems quite necessary to suppose that the President could not carry out prior to the official termination of the declared state of war, deportations which the Executive regarded as necessary for the safety of the country but which could not be carried out during active warfare because of the danger to the aliens themselves or the interference with the effective conduct of military operations." (*United States ex rel. Kessler* v. *Watkins*, 163 F. 2d at 142–43.)

[12] It is suggested that a joint letter to the Chairman of a congressional committee by Attorney General Gregory and the Secretary of Labor in the Wilson administration reflects a contrary interpretation of this Act. But, as the *Kessler* opinion pointed out: "The letter of Attorney General Gregory referred to by appellants' counsel does not affect our conclusions. When he said that there was no law to exclude aliens he was, in our opinion, plainly referring to conditions after the ratification of the peace treaty, and not to prior conditions." *Ibid.* The text of the letter (dated Feb. 5, 1919) supports that observation: "There is no law now on the statute books under which these persons can be excluded from the country, nor under which they can be detained in custody after the ratification of the peace treaty. Unless the bill introduced by you, or one similar in char-

son, 9 Wall. 56, 70; The Protector, 12 Wall. 700; *McElrath* v. *United States*, 102 U. S. 426, 438; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 167. "The state of war" may be terminated by treaty or legislation or Presidential proclamation. Whatever the mode, its termination is a political act.[12] *Ibid.* Whether and when

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acter, is passed it will become necessary on the ratification of peace to set free all of these highly dangerous persons." Hearings before the House Committee on Immigration and Naturalization on H. R. 6750, 66th Cong., 1st Sess., 42–43. And Attorney General Palmer made substantially the same statements to the Senate and House Committees on Immigration. See S. Rep. No. 283, 66th Cong., 1st Sess., 2; H. R. Rep. No. 143, 66th Cong., 1st Sess., 2.

But even if contradictory views were expressed by Attorney General Gregory, they plainly reflect political exigencies which from time to time guide the desire of an administration to secure what in effect is confirming legislation. The confusion of views is strikingly manifested by Attorney General Gregory's recognition that the Act survived the cessation of actual hostilities so as to give authority to apprehend, restrain, and secure enemy aliens. See, generally, World War I cases cited note 8, *supra*. In any event, even if one view expressed by Attorney General Gregory, as against another expressed by him, could be claimed to indicate a deviation from an otherwise uniformly accepted construction of the Act before us, it would hardly touch the true meaning of the statute. *United States ex rel. Hirshberg* v. *Malanaphy*, opinion denying petition for rehearing, United States Circuit Court of Appeals for the Second Circuit, June 2, 1948 (not yet reported). As against the conflicting views of one Attorney General we have not only the view but the actions of the present Attorney General and of the President and their ratification by the present Congress. See note 19, *infra*.

[12] Of course, there are statutes which have provisions fixing the date of the expiration of the war powers they confer upon the Executive. See, *e. g.*, *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 167, n. 1 (collection of statutes providing that the authority terminates upon ratification of treaty of peace or by Presidential proclamation). Congress can, of course, provide either by a day certain or a defined event for the expiration of a statute. But when the life of a statute is defined by the existence of a war, Congress leaves the determination of when a war is concluded to the usual political agencies of the Government.

it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled. Only a few months ago the Court rejected the contention that the state of war in relation to which the President has exercised the authority now challenged was terminated. *Woods* v. *Miller Co.*, 333 U. S. 138. Nothing that has happened since calls for a qualification of that view.[14] It is still true, as was said in the opinion in that case which eyed the war power most jealously, "We have armies abroad exercising our war power and have made no peace terms with our allies, not to mention our principal enemies." *Woods* v. *Miller Co.*, *supra*, at p. 147 (concurring opinion). The situation today is strikingly similar to that of 1919, where this Court observed: "In view of facts of public knowledge, some of which have been referred to, that the treaty of peace has not yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that it cannot even be said that the man power of the nation has been restored to a peace footing, we are unable to conclude that the act has ceased to be valid." *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. at 163.

The political branch of the Government has not brought the war with Germany to an end. On the contrary, it has proclaimed that "a state of war still exists."

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[14] Cf., *e. g.*, the President's address to Congress on March 17, 1948, recommending the enactment of the European recovery program, universal military training, and the temporary reenactment of selective service legislation. H. Doc. No. 569, 80th Cong., 2d Sess. On May 10, 1948, by Executive Order 9957, 13 Fed. Reg. 2503, the President exercised his authority "in time of war, . . .' through the Secretary of War, to take possession and assume control of any system or systems of transportation . . . ." (Act of August 29, 1916, 39 Stat. 619, 645, 10 U. S. C. § 1361.)

Presidential Proclamation 2714, 12 Fed. Reg. 1; see *Woods* v. *Miller Co.*, *supra*, at p. 140; *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116. The Court would be assuming the functions of the political agencies of the Government to yield to the suggestion that the unconditional surrender of Germany and the disintegration of the Nazi Reich have left Germany without a government capable of negotiating a treaty of peace. It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come.[15] These are matters of political judgment for which judges have neither technical competence nor official responsibility.

This brings us to the final question. Is the statute valid as we have construed it? The same considerations of reason, authority, and history, that led us to reject reading the statutory language "declared war" [16] to mean "actual hostilities," support the validity of the statute. The war power is the war power. If the war, as we have held, has not in fact ended, so as to justify local rent control, *a fortiori*, it validly supports the power given to the President by the Act of 1798 in relation to alien enemies. Nor does it require protracted argument to find no defect in the Act because resort to the courts may

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[15] "Rapid changes are taking place in Europe which affect our foreign policy and our national security. . . . Almost 3 years have passed since the end of the greatest of all wars, but peace and stability have not returned to the world." H. Doc. No. 569, *supra*, at p. 1.

[16] We should point out that it is conceded that a "state of war" was "formally declared" against Germany. Act of December 11, 1941, 55 Stat. 796.

be had only to challenge the construction and validity of the statute and to question the existence of the "declared war," as has been done in this case.[17] The Act is almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights.[18] The fact that hearings are utilized by the Executive to secure an informed basis for the exercise of summary power does not argue the right of courts to retry such hearings, nor

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[17] The additional question as to whether the person restrained is in fact an alien enemy fourteen years of age or older may also be reviewed by the courts. See cases cited note 8, *supra*. This question is not raised in this case.

[18] The Fifth Congress was also responsible for "An Act concerning Aliens," approved June 25, 1798, 1 Stat. 570, and "An Act in addition to the act, entitled 'An act for the punishment of certain crimes against the United States,'" approved July 14, 1798, 1 Stat. 596, as well as the instant "An Act respecting Alien Enemies," approved July 6, 1798. It is significant that while the former statutes—the Alien and Sedition Acts—were vigorously and contemporaneously attacked as unconstitutional, there was never any issue raised as to the validity of the Alien Enemy Act. James Madison, in his report on the Virginia Resolutions, carefully and caustically differentiated between friendly and enemy alien legislation, as follows: "The next observation to be made is, that much confusion and fallacy have been thrown into the question by blending the two cases of *aliens, members of a hostile nation*, and *aliens, members of friendly nations*. . . . With respect to alien enemies, no doubt has been intimated as to the Federal authority over them; the Constitution having expressly delegated to Congress the power to declare war against any nation, and, of course, to treat it and all its members as enemies." 6 Writings of James Madison (Hunt, Editor) 360–61. Similarly, Thomas Jefferson, the author of the Kentucky Resolutions of 1798 and 1799, was careful to point out that the Alien Act under attack was the one "which assumes power over alien friends." 8 Writings of Thomas Jefferson (Ford, Editor) 466. There was never any questioning of the Alien Enemy Act of 1798 by either Jefferson or Madison nor did either ever suggest its repeal.

bespeak denial of due process to withhold such power from the courts.

Such great war powers may be abused, no doubt, but that is a bad reason for having judges supervise their exercise, whatever the legal formulas within which such supervision would nominally be confined. In relation to the distribution of constitutional powers among the three branches of the Government, the optimistic Eighteenth Century language of Mr. Justice Iredell, speaking of this very Act, is still pertinent:

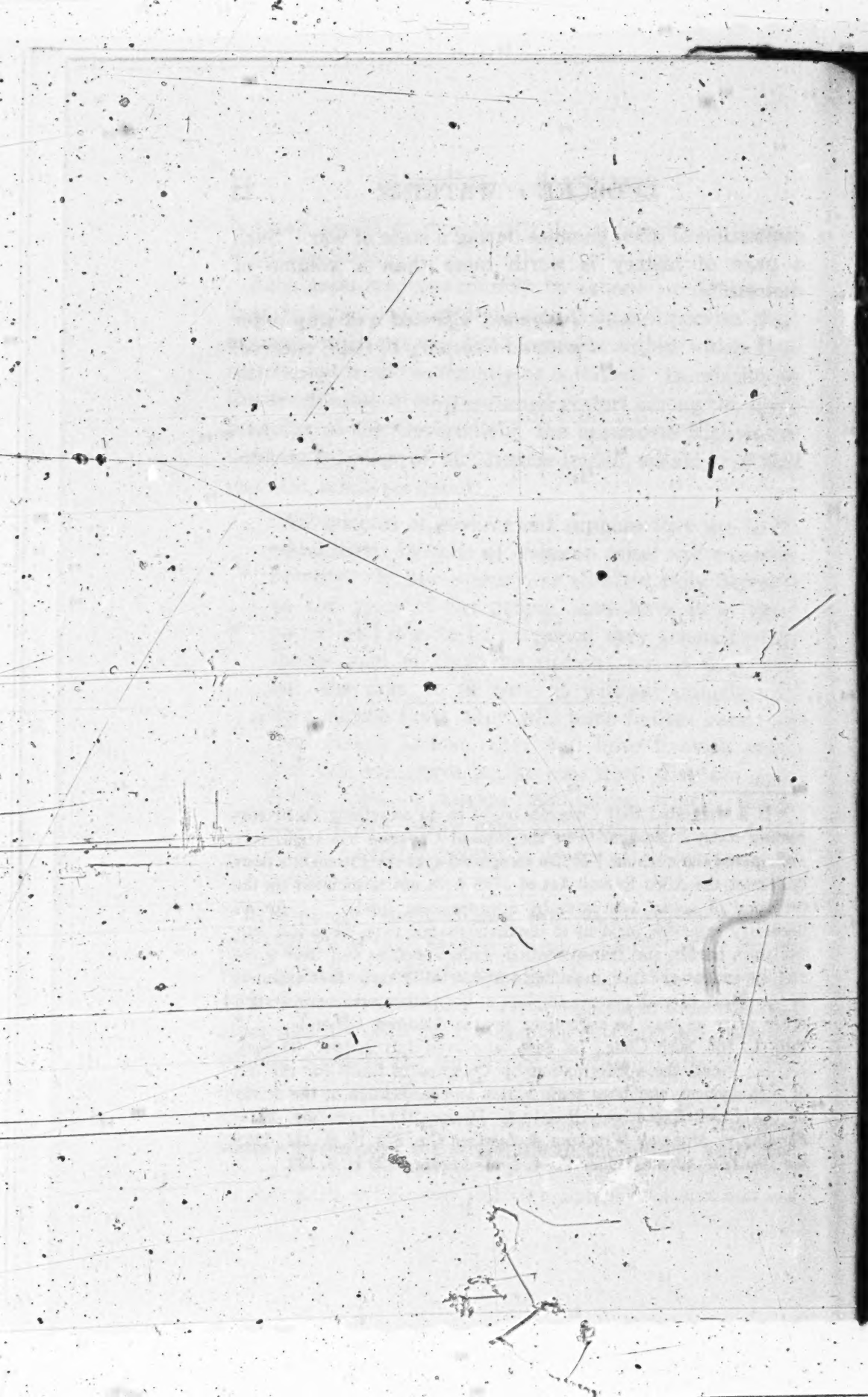
> "All systems of government suppose they are to be administred by men of common sense and common honesty. In our country, as all ultimately depends on the voice of the people, they have it in their power, and it is to be presumed they generally will choose men of their description; but if they will not, the case, to be sure, is without remedy. If they choose fools, they will have foolish laws. If they choose knaves, they will have knavish ones. But this can never be the case until they are generally fools or knaves themselves, which, thank God, is not likely ever to become the character of the American people." (*Case of Fries, supra*, at p. 836.)

Accordingly, we hold that full responsibility for the just exercise of this great power may validly be left where the Congress has constitutionally placed it—on the President of the United States. The Founders in their wisdom made him not only the Commander-in-Chief but also the guiding organ in the conduct of our foreign affairs. He who was entrusted with such vast powers in relation to the outside world was also entrusted by Congress, almost throughout the whole life of the nation, with the

disposition of alien enemies during a state of war. Such a page of history is worth more than a volume of rhetoric.[19]

Judgment affirmed and stay order entered February 2, 1948, vacated.

[19] It is suggested that Congress ought to do something about correcting today's decision. But the present Congress has apparently anticipated the decision. It has recognized that the President's powers under the Alien Enemy Act of 1798 were not terminated by the cessation of actual hostilities by appropriating funds ". . . for all necessary expenses incident to the maintenance, care, detention, surveillance, parole, and transportation of alien enemies and their wives and dependent children, including transportation and other expenses in the return of such persons to place of bona fide residence or to such other place as may be authorized by the Attorney General . . . ." Pub. L. 166, 80th Cong., 1st Sess., approved July 9, 1947, 61 Stat. —, —. "And the appropriation by Congress of funds for the use of such agencies stands as confirmation and ratification of the action of the Chief Executive. *Brooks* v. *Dewar*, 313 U. S. 354, 361." *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116; see also *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139.



SUPREME COURT OF THE UNITED STATES

No. 723.—October Term, 1947.

Kurt G. W. Ludecke, Petitioner, v. W. Frank Watkins, as District Director of Immigration.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 21, 1948.]

Mr. Justice Black, with whom Mr. Justice Douglas, Mr. Justice Murphy and Mr. Justice Rutledge join, dissenting.

The petition for habeas corpus in this case alleged that petitioner, a legally admitted resident of the United States, was about to be deported from this country to Germany as a "dangerous" alien enemy, without having been afforded notice and a fair hearing to determine whether he was "dangerous." The Court now holds, as the Government argued, that because of a presidential proclamation, petitioner can be deported by the Attorney General's order without any judicial inquiry whatever into the truth of his allegations.[1] The Court goes further and holds, as I

[1] The Court specifically holds that this petitioner is not entitled to have this Court or any other court determine whether petitioner has had a fair hearing. The merits of the Attorney General's action are therefore not subject to challenge by the petitioner. Nevertheless the Court in note 3 quotes but of context a short paragraph from a written protest made by petitioner against the Attorney General's procedure. The only possible purpose of this quotation is to indicate that, anyhow, the petitioner ought to be deported because of his views stated in this paragraph of his protest against the Attorney General's procedure. This is a strange kind of due process. The protest pointed out that Hitler had kept petitioner in a concentration camp for eight months for disloyalty to the Nazis and that this Government had then kept him imprisoned for four years on the charge that he

understand its opinion, that the Attorney General can deport him whether he is dangerous or not. The effect of this holding is that any unnaturalized person, good or bad, loyal or disloyal to this country, if he was a citizen of Germany before coming here, can be summarily seized, interned and deported from the United States by the Attorney General, and that no court of the United States has any power whatever to review, modify, vacate, reverse, or in any manner affect the Attorney General's deportation order. MR. JUSTICE DOUGLAS has given reasons in his dissenting opinion why he believes that deportation of aliens, without notice and hearing, whether in peace or war, would be a denial of due process of law. I agree with MR. JUSTICE DOUGLAS for many of the reasons he gives that deportation of petitioner without a fair hearing as determined by judicial review is a denial of due process of law.[2] But I do not reach the question of power to deport aliens of countries with which we are at war while we are at war, because I think the idea that we are still at war with Germany in the sense contemplated by the statute controlling here is a pure fiction. Furthermore, I think there is no act of Congress which lends the slightest basis to the claim that after hostilities with a foreign

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was a Nazi. Immediately before the paragraph cited in the Court's opinion, petitioner's protest contained the following statement:

"Far be it from me, however, to thrust my goodwill upon anybody and insist to stay on a community whose public servants of ill will seek to remove me by pitiful procedures and illegal means. Therefore, I propose that I leave voluntarily as a free man, not as a dangerous alien deportee, at the earliest opportunity provided I shall be allowed sixty days to settle my affairs before sailing date."

Is it due judicial process to refuse to review the whole record to determine whether there was a fair hearing and yet attempt to bolster the Attorney General's deportation order by reference to two sentences in a long record?

[2] Compare *Ex parte Endo*, 323 U. S. 283; *Korematsu v. United States*, 323 U. S. 214.

country have ended the President or the Attorney General, one or both, can deport aliens without a fair hearing reviewable in the courts. On the contrary, when this very question came before Congress after World War I in the interval between the Armistice and the conclusion of formal peace with Germany, Congress unequivocally required that enemy aliens be given a fair hearing before they could be deported.

The Court relies on the Alien Enemy Act of 1798. 1 Stat. 577, 50 U. S. C. § 21–24. That Act did grant extraordinarily broad powers to the President to restrain and "to provide for the removal" of aliens who owe allegiance to a foreign government, but such action is authorized only "whenever there is a declared war between the United States" and such foreign government, or in the event that foreign government attempts or threatens the United States with "any invasion or predatory incursion." The powers given to the President by this statute, I may assume for my purposes, are sufficiently broad to have authorized the President acting through the Attorney General to deport alien Germans from this country while the "declared" second World War was actually going on, or while there was real danger of invasion from Germany. But this 1798 statute, unlike statutes passed in later years, did not expressly prescribe the events which would for statutory purposes mark the termination of the "declared" war or threatened invasions. *See Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 165, n. 1. In such cases we are called on to interpret a statute as best we can so as to carry out the purpose of Congress in connection with the particular right the statute was intended to protect, *United States* v. *Anderson*, 9 Wall. 56, 69–70; *The Protector*, 12 Wall. 700, 702, or the particular evil the statute was intended to guard against. *McElrath* v. *United States*, 102 U. S. 426, 437, 438. See *Judicial Determination of the End of the War*, 47 Col. L. Rev. 255.

The 1798 Act was passed at a time when there was widespread hostility to France on the part of certain groups in the United States. It was asserted by many that France had infiltrated this country with spies preaching "subversive" ideas and activities. Mr. Otis, the chief congressional spokesman for the measure, expressed his fears of ". . . a band of spies . . . spread through the country from one end of it to the other who in case of the introduction of an enemy into our country" might join the enemy "in their attack upon us, and in their plunder of our property . . . ." Annals of Congress, 5th Cong., 2d Sess. 1791. Congressional discussions of this particular measure appear at pp. 1573–1582, 1785–1796, and 2034–2035, Annals of Congress, 5th Cong., 2d Sess.,[3] and show beyond any reasonable doubt that the Alien Enemy Act of 1798 was intended to grant its extraordinary powers only to prevent alien enemies residing in the United States from extending aid and comfort to an enemy country while dangers from actual fighting hostilities were imminently threatened. Indeed, Mr. Otis, who was most persistent in his expressions of anti-French sentiments and in his aggressive sponsorship of this and its companion Alien and Sedition Acts, is recorded as saying ". . . that in a time of tranquility, he should not desire to put a power like this into the hands of the Executive; but, in a time of war, the citizens of France ought to be considered and treated and watched in a very different manner from citizens of our own country." Annals of Congress, 5th Cong., 2d Sess. 1791. And just before the

[3] In addition to the above discussions of the Alien Enemy Act, frequent references to the Act were made in the congressional debates on the Alien Act, 1 Stat. 570, and the Sedition Act, 1 Stat. 596, both of which were passed within two weeks of the adoption of the Alien Enemy Act. These references appear in many places in the Annals of Congress, 5th Cong., 2d Sess. See *e. g.*, 1973–2023.

bill was ordered to be read for its third time, Mr. Gallatin pointed out that the Alien Act had already made it possible for the President to remove all aliens, whether friends or enemies; he interpreted the measure here under consideration, aimed only at alien enemies, as providing "in what manner they may be laid under certain restraints by way of security." For this reason he supported this bill. Annals of Congress, 5th Cong., 2d Sess. 2035.

German aliens could not now, if they would, aid the German Government in war hostilities against the United States. For as declared by the United States Department of State, June 5, 1945, the German armed forces on land and sea had been completely subjugated and had unconditionally surrendered. "There is no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers." And the State Department went on to declare that the United States, Russia, Great Britain, and France had assumed "supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command, and any state, municipal, or local government or authority." 12 State Dept. Bull. 1051. And on March 17, 1948, the President of the United States told the Congress that "Almost three years have passed since the end . . ." of the war with Germany. See Court opinion, n. 15.

Of course it is nothing but a fiction to say that we are now at war with Germany.[4] Whatever else that

[4] The Court cites *Woods* v. *Miller Co.*, 333 U. S. 138, as having held that the war with Germany has not yet terminated. I find no such holding in the opinion and no language that even suggests such a holding. We there dealt with the constitutional war powers of Congress, whether all those powers are necessarily non-existent

fiction might support, I refuse to agree that it affords a basis for today's holding that our laws authorize the peacetime banishment of any person on the judicially unreviewable conclusion of a single individual. The 1798 Act did not grant its extraordinary and dangerous powers to be used during the period of fictional wars. As previously pointed out, even Mr. Otis, with all of his fervent support of anti-French legislation, repudiated the suggestion that the Act would vest the President with such dangerous powers in peacetime. Consequently, the Court today gives the 1798 Act a far broader meaning than it was given by one of the most vociferous champions of the 1798 series of anti-alien and anti-sedition laws.

Furthermore, the holding today represents an entirely new interpretation of the 1798 Act. For nearly 150 years after the 1798 Act there never came to this Court any case in which the Government asked that the Act be interpreted so as to allow the President or any other person to deport alien enemies without allowing them access to the courts. In fact, less than two months after the end of the actual fighting in the first World War, Attorney General Gregory informed the Congress that, although there was power to continue the internment of alien enemies after the cessation of actual hostilities and until the ratification of a peace treaty, still there was no statute under which they could then be deported.[8] For this reason the Attorney General re-

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when there are no actual hostilities. Decision of that question has hardly even a remote relevancy to the meaning of the 1798 Alien Enemy Act. The Court today also seeks to support its judgment by a quotation from a concurring opinion in the *Woods* case, *supra*. But the concurring opinion cited was that of a single member of the Court.

[8] In a letter addressed to the Chairman of the House Committee on Immigration and Naturalization dated January 9, 1919, Attorney General Gregory explained that a number of German subjects who

quested Congress to enact new legislation to authorize deportation of enemy aliens at that time. The bill thereafter introduced was endorsed by both the Attorney General and the Secretary of Labor in a joint letter in which they asked that it be given "immediate consideration" in view of the "gravity of this situation." Hearings before the House Committee on Immigration and Naturalization on H. R. 6750, 66th Cong., 1st Sess. 42–43. Several months later Attorney General Palmer submitted substantially the same statements to the House and Senate Committees on Immigration. H. R. Rep. 143, 66th Cong., 1st Sess. 2; S. Rep. 283, 66th Cong., 1st Sess. 2. See also Report of the Attorney General, 1919, 25–28.

A bill to carry out the recommendations of the Wilson administration was later passed, 41 Stat. 593 (1920), but not until it had been amended on the floor of the House of Representatives to require that all alien enemies be

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had "been interned pursuant to section 4067 of the Revised Statutes" [section 1 of the Alien Enemy Act of 1798], were still held in custody. He then stated:

"The authority given by the President to regulate the conduct of enemy aliens during the existence of the war, in my opinion, could not properly be used *at this time* to bring about the deportation of these aliens. There is now, therefore, no law under which these persons can be expelled from the country nor, if once out of it, prevented from returning to this country. I have, therefore, caused to be prepared the inclosed draft of a proposed bill, the provisions of which are self-explanatory." (Italics added.) H. Rep. No. 1000, 65th Cong., 3d Sess. 1–2. This position of the Attorney General that there then was no power under existing law to deport enemy aliens was reiterated by representatives of the Attorney General in hearings before the House Committee on Immigration and Naturalization on the bill enacted into law. Hearings on H. R. 6750, 66th Cong., 1st Sess. 3–21. In conformity with this interpretation of the 1798 Alien Enemy Act the Wilson administration did not attempt to deport interned alien enemies under the 1798 Act after the Armistice and before Congress by statute expressly authorised such deportations as requested by the two Attorney Generals. Report of the Attorney General 1919, 25–28.

given a fair hearing before their deportation. 58 Cong. Rec. 3366. That a fair hearing was the command of Congress is not only shown by the language of the Act but by the text of the congressional hearings, by the committee reports and by congressional debates on the bill. In fact, the House was assured by the ranking member of the Committee reporting the bill that in hearings to deport alien enemies under the bill "a man is entitled to have counsel present, entitled to subpoena witnesses and summon them before him and have a full hearing, at which the stenographer's minutes must be taken." 58 Cong. Rec. 3373. See also 3367 and 3372. Congress therefore after the fighting war was over authorized the deportation of interned alien enemies only if they were "given a full hearing, as in all cases of deportation under existing laws." H. R. No. 143, 66th Cong., 1st Sess. 2.

This petitioner is in precisely the same status as were the interned alien enemies of the first World War for whom Congress specifically required a fair hearing with court review as a prerequisite to their deportation. Yet the Court today sanctions a procedure whereby petitioner is to be deported without any determination of his charge that he has been denied a fair hearing. The Court can reach such a result only by rejecting the interpretation of the 1798 Act given by two Attorney Generals, upon which Congress acted in 1920. It is held that Congress and the two Attorney Generals of the Wilson administration were wrong in believing that the 1798 Act did not authorize deportation of interned enemy aliens after hostilities and before a peace treaty. And in making its novel interpretation of the 1798 Act the Court today denies this petitioner and others the kind of fair hearing that due process of law was intended to guarantee. See *The Japanese Immigrant Case*, 189 U. S. 86, 100–101, read and explained on the floor of the House of Repre-

sentatives at 58 Cong. Rec. 3373, read into the House Committee hearings, *supra* at 19–20, and quoted in part in note 2 of MR. JUSTICE DOUGLAS' dissenting opinion.

The Court's opinion seems to fear that Germans if now left in the United States might somehow "have a potency for mischief" even after the complete subjugation and surrender of Germany, at least so long as the "peace of Peace has not come." This "potency for mischief" can of course have no possible relation to apprehension of any invasion by or war with Germany. The apprehension must therefore be based on fear that Germans now residing in the United States might emit ideas dangerous to the "peace of Peace." But the First Amendment represents this nation's belief that the spread of political ideas must not be suppressed. And the avowed purpose of the Alien Enemy Act was not to stifle the spread of ideas after hostilities had ended.[6] Others in

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[6] As a justification for its interpretation of the 1798 Act the Court appears to adopt the reasons advanced by the Second Circuit Court of Appeals in *United States ex rel. Kessler* v. *Watkins*, 163 F. 2d 140, decided in 1947. That Court emphasized the difficulty of deportation of alien enemies during the time of actual hostility "because of the danger to the aliens themselves or the interference with the effective conduct of military operations." This reasoning would of course be persuasive if the object of the 1798 statute had been punishment of the alien enemies, but the whole legislative history shows that such was not the purpose of the Act. Hence the Act cannot be construed to authorize the deportation of an enemy alien after the war is over as punishment. Furthermore, the purpose of deportation, so far as it was authorized (if authorized) under the 1798 Act, was not to protect the United States from ideas of aliens *after* a war or threatened invasion but to protect the United States against sabotage, etc., *during* a war or threatened invasion. Nevertheless, the Circuit Court of Appeals thought that without its interpretation "the Executive would be powerless to carry out internment or deportation which was not exercised during active war and might be obliged to leave the country unprotected from aliens dangerous either because of secrets which

the series of Alien and Sedition Acts did provide for prison punishment of people who had or at least who dared to express political ideas.[7] I cannot now agree to an interpretation of the Alien Enemy Act which gives a new life to the long repudiated anti-free speech and anti-free press philosophy of the 1798 Alien and Sedition Acts. I would not disinter that philosophy which the people have long hoped Thomas Jefferson had permanently buried when he pardoned the last person convicted for violation of the Alien and Sedition Acts.

Finally, I wish to call attention to what was said by Circuit Judge Augustus Hand in this case speaking for himself and Circuit Judges Learned Hand and Swan, before whom petitioner argued his own cause. Believing the deportation order before them was not subject to judicial review, they saw no reason for discussing the ". . . nature or weight of the evidence before the Repatriation Hearing Board, or the finding of the Attorney General . . . ." But they added: "However, on the face of the record it is hard to see why the relator should now

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they possessed or because of potential inimical activities." But after a war is over the only "inimical activities" would relate to peacetime governmental matters—not the type of conduct which concerned those who passed the Alien Enemy Act. Moreover, it is difficult to see why it would endanger this country to keep aliens here "because of secrets which they possess." And of course the executive is not powerless to send dangerous aliens out of this country, even if the 1798 Act does not authorize their deportation, for there are other statutes which give broad powers to deport aliens. There is this disadvantage to the Government, however, in connection with the other deportation statutes—they require a hearing and the executive would not have arbitrary power to send them away with or without reasons.

[7] See Bowers, Jefferson and Hamilton, 1925, c. XVI, "Hysterics," and c. XVII, "The Reign of Terror"; 1 Morison, Life of Otis, c. VIII, "A System of Terror."

be compelled to go back. Of course there may be much not disclosed to justify the step; and it is of doubtful propriety for a court ever to express an opinion on a subject over which it has no power. Therefore, we shall, and should, say no more than to suggest that justice may perhaps be better satisfied if a reconsideration be given him in the light of the changed conditions, since the order of removal was made eighteen months ago." 163 F. 2d at 144.

It is not amiss, I think, to suggest my belief that because of today's opinion individual liberty will be less secure tomorrow than it was yesterday. Certainly the security of aliens is lessened, particularly if their ideas happen to be out of harmony with those of the governmental authorities of a period. And there is removed a segment of judicial power to protect individual liberty from arbitrary action, at least until today's judgment is corrected by Congress [8] or by this Court.

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[8] It is suggested in the Court's opinion that Congress by appropriating funds in 1947 to "return" alien enemies to their "bona fide residence or to such other place as may be authorized by the Attorney General" has already approved the Attorney General's interpretation of the 1798 Act as authorizing the present deportation of alien enemies without affording them a fair hearing. But no such strained inference can be drawn. Congress did not there or elsewhere express a purpose to deny these aliens a fair hearing after the war was over. Until it does so, I am unwilling to attribute to the Congress any such attempted violation of the constitutional requirement for due process of law.

SUPREME COURT OF THE UNITED STATES

No. 723.—October Term, 1947.

Kurt G. W. Ludecke, Petitioner,
v.
W. Frank Watkins, as District Director of Immigration.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 21, 1948.]

Mr. Justice Douglas, with whom Mr. Justice Murphy and Mr. Justice Rutledge, concur, dissenting.

I do not agree that the sole question open on *habeas corpus* is whether the petitioner is in fact an alien enemy.[1] That delimitation of the historic writ is a wholly arbitrary one. I see no reason for a more narrow range of judicial inquiry here than in *habeas corpus* arising out of any other deportation proceeding.

It is undisputed that in peacetime an alien is protected by the due process clause of the Fifth Amendment. *Wong Wing* v. *United States*, 163 U. S. 228. Federal courts will then determine through *habeas corpus* whether or not a deportation order is based upon procedures affording due process of law. *Vajtauer* v. *Commissioner*, 273 U. S. 103, 106. In deportation proceedings due process requires reasonable notice (*Tisi* v. *Tod*, 264 U. S. 131, 134), a fair hearing (*Bridges* v. *Wixon*, 326 U. S. 135, 156;

[1] See *United States ex rel. Schlueter* v. *Watkins*, 67 F. Supp. 556, aff'd 158 F. 2d 853; *United States* v. *Longo*, 46 F. Supp. 170; *United States* v. *Uhl*, 46 F. Supp. 688, rev'd on other grounds, 137 F. 2d 858; *Ex parte Gilroy*, 257 F. 110; *Banning* v. *Penrose*, 255 F. 159; *Ex parte Fronklin*, 253 F. 984; *Minotto* v. *Bradley*, 252 F. 600. Cf. *Citizens Protective League* v. *Clark*, 155 F. 2d 290; *DeLacey* v. *United States*, 249 F. 625. In the *Schlueter* case it was held that the Constitution and the statute do not require a hearing and thus an alien enemy cannot complain of the character of the hearing he did receive. 67 F. Supp. at 565.

Chin Yow v. *United States*, 208 U. S. 8, 12; *Low Wah Suey* v. *Backus*, 225 U. S. 460), and an order supported by some evidence (*Vajtauer* v. *Commissioner*, *supra*, p. 106; *Zakonaite* v. *Wolf*, 226 U. S. 272, 274). And see *Kwock Jan Fat* v. *White*, 253 U. S. 454.

The rule of those cases is not restricted to instances where Congress itself has provided for a hearing. *The Japanese Immigrant Case*, 189 U. S. 86, decided in 1903, so held. The Court in that case held that due process required that deportation be had only after notice and hearing even though there, as here, the statute prescribed no such procedure but entrusted the matter wholly to an executive officer.[2] Consistently with that principle we held in *Bridges* v. *Wixon*, *supra*, that a violation of the rules governing the hearing could be reached on *habeas corpus*, even though the rules were prescribed not by Congress but by the administrative agency in charge of the deportation proceeding. We stated, p. 154,

> "We are dealing here with procedural requirements prescribed for the protection of the alien. Though

[2] The Court said, 189 U. S. p. 101: ". . . no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognised."

deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

The same principles are applicable here. The President has classified alien enemies by regulations of general applicability and has authorized deportation only of those deemed dangerous because they have adhered to an enemy government, or the principles thereof. Petitioner was in fact given a hearing in 1945 before the Repatriation Hearing Board in addition to one in 1942 before the Alien Enemy Hearing Board. The order for his deportation recites that "upon consideration of the evidence presented" before those Boards, the Attorney General, in the words of the Proclamation, deems petitioner "to be dangerous to the public peace and safety of the United States because he has adhered to a government with which the United States is at war or to the principle thereof." Those findings and conclusions and the procedure by which they were reached must conform with the requirements of due process. And *habeas corpus* is the time-honored procedure to put them to the test.

The inquiry in this type of case need be no greater an intrusion in the affairs of the Executive branch of government than inquiries by *habeas corpus* in times of peace into a determination that the alien is considered to be an "undesirable resident of the United States." See *Mahler* v. *Eby*, 264 U. S. 32. Both involve only a determination that procedural due process is satisfied, that

there be a fair hearing, and that the order be based upon some evidence.

The needs of the hour may well require summary apprehension and detention of alien enemies. A nation at war need not be detained by time-consuming procedures while the enemy bores from within. But with an alien enemy behind bars, that danger has passed. If he is to be deported only after a hearing, our constitutional requirements are that the hearing be a fair one. It is foreign to our thought to defend a mock hearing on the ground that in any event it was a mere gratuity. Hearings that are arbitrary and unfair are no hearings at all under our system of government. Against them *habeas corpus* provides in this case the only protection.

The notion that the discretion of any officer of government can override due process is foreign to our system. Due process does not perish when war comes. It is well established that the war power does not remove constitutional limitations safeguarding essential liberties. *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 426.